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No. 97-1056-CFX Title: Naomi Marquez, Petitioner
v.
Screen Actors Guild, Inc., et al.

Docketed: December 29, 1997 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Nov 5 1997	Application (A97-343) to extend the time to file a petition for a writ of certiorari from November 27, 1997 to January 15, 1998, submitted to Justice O'Connor.
	Nov 6 1997	Application (A97-343) granted by Justice O'Connor extending the time to file until December 27, 1997.
	Dec 24 1997	Petition for writ of certiorari filed. (Response due February 18, 1998)
	Jan 21 1998	Order extending time to file response to petition until February 18, 1998.
	Feb 18 1998	Brief of respondent Screen Actors Guild, Inc. in opposition filed.
	Feb 23 1998	Reply brief of petitioner Naomi Marquez filed.
	Feb 25 1998	DISTRIBUTED. March 20, 1998
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	Mar 23 1998	Petition GRANTED. SET FOR ARGUMENT October 5, 1998. **********
	May 7 1998	Joint appendix filed.
	May 7 1998	Brief of petitioner Naomi Marquez filed.
	May 20 1998	Order further extending time to file brief of respondent on the merits until June 30, 1998.
	Jun 30 1998	Brief of respondent Screen Actors Guild, Inc. filed.
	Jul 31 1998	CIRCULATED.
	Jul 31 1998	Reply brief of petitioner Naomi Marquez filed.
	Aug 19 1998	Supplemental brief of petitioner Naomi Marquez filed.
	Sep 1 1998	Record filed.
	Sep 14 1998	Brief of respondent in reply to supplemental brief of petitioner filed.

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No. 97-_____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NAOMI MARQUEZ,

Petitioner,

v.

SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does a union breach its duty of fair representation when it negotiates and maintains a compulsory unionism provision that, on its face, requires—misleadingly—that an employee be "a member of the Union" and pay the periodic dues and initiation fee "uniformly required as a condition of acquiring membership," even though those requirements cannot lawfully be enforced literally as a condition of employment?

II. Does the National Labor Relations Board have exclusive jurisdiction over a performer's claim that a union breached its duty of fair representation by negotiating and maintaining a compulsory unionism provision that misleadingly requires payment of dues as a condition of employment after thirty days of "employment as a performer in the motion picture industry"? If the Board does not have exclusive jurisdiction over this claim, did the union breach its duty of fair representation by negotiating and maintaining that provision?

III. Is the employer an indispensable party to a suit for breach of the duty of fair representation where an employee seeks reformation or expungement of a collective bargaining agreement provision alleged to be facially invalid?

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IN THE
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NAOMI MARQUEZ,

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v.

SCREEN ACTORS GUILD, INC., and
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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Naomi Marquez respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered on August 29, 1997.

OPINIONS BELOW

The opinion of the court of appeals, (Appendix ("App.") A, *infra*, 1a), is reported at 124 F.3d 1034. The opinion of the United States District Court for the Western District of Washington, (App. B, *infra*, 22a), is unreported.

JURISDICTION

The court of appeals entered its judgment on August 29, 1997. On November 6, 1997, Justice O'Connor granted a timely application for an extension of time within which to file this Petition. Justice O'Connor extended the time to and including December 27, 1997, a Saturday, thus extending the time under Supreme Court Rule 30.1 to and including December 29, 1997. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1) (West 1993).

STATUTORY PROVISIONS INVOLVED

This case involves sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 158(a)(3) and 158(b)(2) (1988). Their pertinent text is set out in Appendix C, *infra*, 35a.

STATEMENT OF THE CASE

This case involves the construction of NLRA section 8(a)(3)'s authorization of compulsory unionism requirements in collective bargaining agreements.

As pertinent to this Petition, this is a civil action for breach of the duty of fair representation under section 9(a) of the Act, 29 U.S.C. § 159(a) (1988), which is an act of Congress regulating commerce. Petitioner Naomi Marquez ("Ms. Marquez"), therefore, contends that the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) (1988) and section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185 (1988). The district court and court of appeals exercised jurisdiction over some of her unfair representation claims. (*see* App. at 6a-10a, 13a-19a, 28a-30a), but held that others are subject to the

exclusive jurisdiction of the National Labor Relations Board ("Board" or "NLRB"), (*see* App. at 10a-13a, 30a-31a).[1]

I. The Facts.

Ms. Marquez is a part-time actress. Respondent Lakeside Productions, Inc. ("Lakeside") produced a television series called "Medicine Ball." It is an employer within the meaning of the NLRA, 29 U.S.C. § 152(2) (1988). Respondent Screen Actors Guild, Inc. ("SAG") is a labor organization within the meaning of the NLRA, 29 U.S.C. § 152(5) (1988). It was the exclusive bargaining agent for performers engaged by Lakeside for "Medicine Ball." (App. at 1a-2a.)

In July 1994, Lakeside and SAG entered into a collective bargaining agreement ("CBA") containing a "union security" provision. That provision required every performer previously employed "'as a performer in the motion picture industry'" thirty days or more before beginning employment by Lakeside "to be 'a member of the Union in good standing' and to pay periodic dues and initiation fees." (*Id.* at 2a, 10a, 23a.)[2]

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[1] The lower courts also dismissed alleged violations of implied terms of the collective bargaining agreement between Respondents. (*See* App. at 19a-21a, 31a-32a.) Ms. Marquez does not here pursue those claims.

[2] The exact language concerning the payment of dues and initiation fees was that the

> Producer shall not be held to have violated this paragraph if it employs a performer who is not a member of the Union in good standing, . . . if the Producer has reasonable grounds for believing that membership in the Union was denied . . . or . . . terminated for reasons other than the failure of the performer to tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union . . . .

(Walker Dep., Ex. 7 at 6 (filed Dec. 28, 1995).)

According to SAG's Assistant Hollywood Executive Director of Legal Affairs, (Shapiro Decl. at 1, ¶ 1 (filed Dec. 28, 1995)), SAG knew when it entered into this agreement with Lakeside that it could not lawfully require membership as a condition of employment. SAG also knew that performers had a right under *Communications Workers v. Beck*, 487 U.S. 735 (1988), to pay less than the full dues and initiation fee. (Shapiro Decl. at 2, ¶ 5; Shapiro Dep. at 38-40 (filed Dec. 28, 1995).)

On August 29, 1994, Ms. Marquez auditioned for a small part in an episode of "Medicine Ball." Lakeside offered her the part, and she accepted. However, Lakeside and SAG also had an agreement that required Lakeside to clear all performers with "Station 12," a department of SAG, as to their compliance with the "Union Security" provision before employment began. Lakeside's casting director's office, therefore, called Station 12 to clear Ms. Marquez. (App. at 2a.)

Ms. Marquez was not a SAG member. (*Id.* at 24a.) However, she had worked on one production covered by a SAG agreement for more than a month in 1989. Consequently, Station 12 informed Lakeside, at the least, that Ms. Marquez must pay SAG's initiation fee and dues before she could be cleared to work in "Medicine Ball." (*Id.* at 2a-3a.) "The record contains conflicting evidence with regard to whether SAG representatives impermissibly asserted that Marquez was required to 'join' the union before she would be eligible to work or whether the term used was must 'pay' the union." (*Id.* at 14a.)

When she learned that she must pay SAG before she could work, Ms. Marquez called SAG's Seattle office and asked what it cost to join. She was told that the fee was about $500.00. Ms. Marquez then notified her talent agents that she did not have the necessary money. Lakeside would have paid Ms. Marquez $550.00 for doing the part. However, Lakeside would not have paid her until thirty days after the performance. (*Id.* at 3a.)

Over the next few days, Ms. Marquez's agents tried to solve her problem in several telephone calls to Lakeside, its casting office, and SAG. However, SAG continued to insist that Ms. Marquez pay before being cleared for work and would not permit her to pay after she was paid for acting in "Medicine Ball." (*Id.* at 3a-4a.)[3] SAG also never told Ms. Marquez that she had a right under *Beck* to object and pay only that portion of dues and fees that represents collective bargaining costs. (*Id.* at 17a-18a.)

Ms. Marquez's role was scheduled to be filmed on September 8, 1994. When she did not pay SAG the necessary dues and initiation fee before its deadline on September 7, Lakeside replaced her with another actress. Lakeside filmed the part as scheduled on the 8th. (*Id.* at 4a.)

II. Proceedings Below.

Ms. Marquez filed her Complaint against SAG and Lakeside in December 1994. It stated two causes of action, breach of the duty of fair representation and breach of implied terms of the collective bargaining agreement. (*Id.* at 4a.) Only the first claim is relevant to this Petition.

Ms. Marquez's first claim for relief is that SAG breached the duty of fair representation it owed her by negotiating and enforcing the compulsory unionism provision of its collective bargaining agreement with Lakeside. She alleges that SAG breached that duty because that provision, on its face and as applied: required union membership, did not provide a thirty-day "grace period" after employment by Lakeside before any obligations to SAG arose, and did not limit an employee's obligation to payment of a fee to defray SAG's costs of collective bargaining,

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[3] After SAG learned that Ms. Marquez had obtained legal counsel, SAG faxed a letter to Lakeside saying that it did not object to her working. However, this letter arrived after Lakeside had already replaced Ms. Marquez. (App. at 3a-4a.)

contract administration, and grievance adjustment. (*Id.*) This claim also alleges that SAG violated its duty of fair representation by failing to advise Ms. Marquez accurately of her rights and obligations under the NLRA. (*Id.* at 16a.)

The parties filed cross-motions for summary judgment. (*Id.* at 22a.) The district court granted Defendants' motion on all claims, and denied Ms. Marquez's. It ruled that SAG did not breach the duty of fair representation by negotiating and enforcing the requirements of full "membership" and payment of full dues. (*Id.* at 28a-30a.) The court held that Ms. Marquez's unfair representation claims concerning the employment-in-the-industry provision are "preempted by the exclusive jurisdiction of the National Labor Relations Board." (*Id.* at 30a-31a.) The court also rejected the breach of contract claims. (*Id.* at 31a-32a.)

Ms. Marquez timely appealed. (*Id.* at 5a.) The court of appeals reversed the summary judgment as to her claims that SAG's enforcement of the compulsory unionism provision breached the duty of fair representation. The court found that there are disputes over genuine issues of material fact. It also reversed because the district court failed both to address Ms. Marquez's allegation that SAG's failure to notify her of her *Beck* rights breached the duty and to analyze the enforcement claims "under the arbitrariness standard of *Vaca*" *v. Sipes*, 386 U.S. 171 (1967). The court of appeals remanded the case for resolution of those claims. (App. at 13a-19a.)

However, the court of appeals affirmed "the district court's conclusion that SAG did not breach its duty of fair representation by negotiating a CBA which requires covered actors to be members of the union in good standing." (*Id.* at 6a-10a.)

The court acknowledged that, under this Court's decisions in *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), and *Beck*, "unions can require no more than payment of initiation fees and dues covering a 'financial core' of services provided to all employees . . . limited to expenditures germane to 'collective

bargaining, contract administration, and grievance adjustment.'" (App. at 7a (quoting *Beck*, 487 U.S. at 745).) Nonetheless, the court decided to follow decisions of two other Circuits that have "held that terms requiring union 'membership' continue to be permissible under federal law." (*Id.* at 8a (citing *Electronic Workers v. NLRB*, 41 F.3d 1532 (D.C. Cir. 1994), and *Nielsen v. Machinists Local 2569*, 94 F.3d 1107 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1426 (1997).) The court recognized that its decision on this issue conflicts with *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994), citing *Bloom* as contrary to *Electronic Workers* and *Nielsen*. (*Id.*)

In considering Ms. Marquez's claim that the employment-in-the-industry provision on its face breached the duty of fair representation, the court of appeals conceded that "[d]iscerning a principled distinction between a disguised unfair labor practices claim and a straightforward breach of duty claim is no simple matter." (*Id.* at 12a.) However, the court nevertheless affirmed "the district court's conclusion that Marquez's challenge to the CBA's 30 day term is preempted by the NLRB's exclusive jurisdiction." (*Id.* at 10a-13a).

Finally, in the portion of its opinion "affirm[ing] the district court's dismissal of the breach of contract claim," (*id.* at 19a-21a), the court of appeals rejected Ms. Marquez's contention that "Lakeside is implicated in SAG's alleged failures in fairly representing her" and is "a necessary party to obtain full relief through contract reformation." (*Id.* at 20a.)

REASONS FOR GRANTING THE WRIT

I. There Is a Widespread Conflict Among the Circuits, and Within the NLRB, as to Whether NLRA Section 8(a)(3) Permits Agreements That Purport to Require "Membership" and Payment of Full Dues, Although That Section, as Definitively Interpreted by This Court, Prohibits Enforcement of Those Requirements.

A. The Conflict.

In *Beck* this Court addressed the "limits § 8(a)(3) places on the ***negotiation*** and enforcement of union-security agreements." 487 U.S. at 745 (emphasis added). The Court reiterated that, "[t]aken as a whole, § 8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the 'membership' that may be so required has been 'whittled down to its financial core.'" *Id.* (footnote omitted) (quoting *General Motors*, 373 U.S. at 742). The Court then determined that "this 'financial core' [does not] include[] the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." *Id.*

It logically follows from *General Motors* and *Beck* that a "union-security" agreement cannot lawfully state conditions of employment—"membership" and payment of full dues—that cannot lawfully be enforced. Yet, surprisingly, the United States Courts of Appeals, and the NLRB, are in deep conflict over the facial validity under the NLRA of compulsory unionism provisions that purport to require full union membership and/or the payment of full union dues as a condition of employment.

In addition to the Ninth Circuit in this case, four other courts of appeals have faced this issue. One, the District of Columbia Circuit, has taken the same position as the Ninth Circuit in this case, indeed, was followed by the Ninth Circuit here. *See*

Electronic Workers, 41 F.3d at 1537-39.[4] Two other Circuits, the Sixth and Eighth, take a directly contrary position. *See Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *petition for cert. docketed*, 66 U.S.L.W. ____ (U.S. Dec. 8, 1997) (No. 97-945); *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994). And, there is a conflict on this issue between the decisions of two different panels of a fourth court of appeals, the Seventh Circuit. *Compare Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986 (7th Cir. 1997) *with Nielsen*, 94 F.3d at 1113-15.

The Eight Circuit was the first court of appeals to address this controversial issue. In *Bloom*, it reversed a NLRB-approved settlement agreement requiring a union and employer "to post notices informing employees that they would 'no longer give effect to the provision in [the] contract . . . that requires employees become and remain "members in good standing" as a condition of continued employment unless such provision also provides that employees need only pay the Union's periodic dues and initiation fees.'" 30 F.3d at 1002, 1004 (alteration in original). This notice was "not sufficient to protect [the] employees' . . . right to refrain from union activities," the court ruled, because, under *Beck*, employees "cannot be obligated as a condition of their employment to pay *all* union dues and initiation fees, as the above notice seems to imply." *Id.* at 1004-05.

Bloom concluded that "an adequate remedy . . . requires expunction of the offending clause" from the collective bargaining agreement. *Id.* at 1005. *Bloom* thus held, directly contrary to the

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[4] It is unclear whether the District of Columbia Circuit would take the same position as to compulsory unionism provisions negotiated after *Electronic Workers*. The court there said that the NLRB was "free to reconsider its . . . policy in light of evolving Supreme Court precedent and to conclude that, in the future, unions will be found guilty of a duty-of-fair-representation violation if they adopt 'ambiguous' union-security provisions . . . without apprising employees of their rights under such provisions." 41 F.3d at 1538.

Ninth Circuit in this case, that a compulsory unionism clause that does not say that an employee's only obligation is to pay for collective bargaining costs is "facially invalid," as a district court later applying *Bloom* recognized. *See Schreier v. Beverly Cal. Corp.*, 892 F. Supp. 225, 226-27 (D. Minn. 1995).

The Sixth Circuit was the latest court of appeals to face this issue, and its decision, too, directly conflicts with that of the Ninth Circuit in this case. The collective bargaining agreement in *Buzenius* "require[d] employees to become and remain 'members of the Union in good standing' as a condition of continued employment." 124 F.3d at 788.

"Because the express language of this clause is inconsistent with employees' right to refuse to join the Union or pay full dues, so long as they pay that portion of dues related to core representational activities, and because the clause cannot be interpreted without resort to material outside of the CBA," the Sixth Circuit held "that the clause is facially invalid." The court found that "the Board abused its discretion in refusing to order that the clause requiring that employees be 'members of the Union in good standing' either be modified to define that requirement or be removed from the CBA." *Id.* at 793.

The Sixth Circuit acknowledged in *Buzenius* that there is a split in the Circuits on this issue, and that this Court "has never squarely faced th[e] issue." *See id.* at 791-92. However, the Sixth Circuit declined to follow the courts that had upheld compulsory unionism provisions purporting to require more than can lawfully be enforced, because to "permit the CBA to say what it cannot literally mean does violence both to the Act's policy of voluntary unionism and to principles of contract interpretation." *Id.* at 792.

The Seventh Circuit's position on this issue is, to say the least, confused. In *Nielsen*, the court "agree[d] with the D.C. Circuit . . . that *Beck* did not, either explicitly or implicitly, call into question the facial validity of union security clauses" that require the payment of union dues without "not[ing] that

employees [are] only obligated to pay for core representational activities." 94 F.3d at 1113-15.

Later, in *Wegscheid*, another panel of the Seventh Circuit indicated that it would have reached a result contrary to *Nielsen* in an appropriate case. *Wegscheid* was an employees' suit alleging that their exclusive bargaining agent breached the duty of fair representation by negotiating and enforcing a compulsory unionism provision that did "not advise the employees of their right (announced in *Beck*) not to join the union and instead to pay only an agency fee." 117 F.3d at 988. The court held that the facial challenge to the provision was "moot," because a settlement of the enforcement count of the complaint gave the plaintiffs "all the relief that *they* need to protect themselves against being misled" by "the objectionable language in the collective bargaining agreement." *Id.* at 990.

However, the *Wegscheid* court also "emphasize[d]," inconsistently with *Nielsen*, that:

> nothing we have said has been intended to suggest that unions and employers have a privilege to incorporate the language of section 8(a)(3) of the NLRA into their collective bargaining agreements if the consequence is to mislead the employees. This language does not mean what it says, and if its inclusion without appropriate qualification misleads employees, either ***by itself*** or in conjunction with other misleading representations, the union cannot hide behind the fact that it is, after all, the words of Congress that it is repeating.

117 F.3d at 991 (emphasis added).

This widespread conflict among, and within, the Circuits concerning the facial validity of compulsory unionism provisions requiring full membership and/or payment of full dues is aggra-

vated by a split within the NLRB over the same issue. In *Electronic Workers Local 444 (Paramax Sys. Corp.)*, the Board held that a "union-security clause requiring that employees become and remain 'members of the Union in good standing'" was not facially unlawful. 311 N.L.R.B. 1031, 1033 & n.6 (1993), *petition for review denied in pertinent part*, 41 F.3d 1532 (D.C. Cir. 1994).[5] However, later, in *Teamsters Local 443 (Connecticut Limousine Serv.)*, the Board's current Chairman announced that he "agree[s] with the Sixth Circuit's recent decision in *Buzenius* that union-security clauses containing [language requiring employees to become 'members of the Union in good standing'] are facially invalid." 324 N.L.R.B. No. 105, slip op. at 6 n.1 (Oct. 2, 1997) (Gould, Chairman, dissenting in part) (citation omitted); *accord Monson Trucking, Inc.*, 324 N.L.R.B. No. 149, slip op. at 6 (Oct. 31, 1997) (Gould, Chairman, concurring).

B. The Importance of the Issue.

This question manifestly is important, both in principle and in practice, as this Court previously recognized by granting certiorari in cases such as *Beck*.

It is important in principle, because a requirement that employees join or pay full union dues as a condition of employment impairs an employee right explicitly guaranteed in NLRA section 7 and a fundamental congressional policy imbedded in the Act. The employee right impaired is the "right to refrain from" union membership "except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section [8(a)(3)]." 29 U.S.C. § 157 (1988). The fundamental

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[5] The Board instead found the clause "ambiguous," and concluded that the unions' "failure to clarify the ambiguity constituted a breach of their duty of fair representation." *Electronic Workers Local 444*, 311 N.L.R.B. at 1033 n.6, *petition for review granted & enforcement denied in pertinent part*, 41 F.3d 1532 (D.C. Cir. 1994).

congressional policy impaired is that of protecting employees' "full freedom of association," 29 U.S.C. § 151 (1988), and "the rights of individual employees in their relations with labor organizations," 29 U.S.C. § 141(b) (1988). More particularly, the policy impaired is "the congressional policy of voluntary unionism" that is "implicit in § 8(a)(3)." *Pattern Makers v. NLRB*, 473 U.S. 95, 104-05, 114 (1985); *see Buzenius*, 124 F.3d at 792-93.

Whether NLRA section 8(a)(3) permits agreements that say that "membership" and payment of full dues are required, although that section as definitively interpreted by this Court prohibits enforcement of those requirements, is important in practice for two reasons.

First, the Court's resolution of this question will affect a large number of such agreements. Compulsory unionism agreements are lawful in twenty-nine states and the District of Columbia. *See* Lab. Rel. Rep. (BNA), *Labor Relations Expediter* 730:319 (Oct. 24, 1994). As NLRB Chairman Gould recently reported, "many or most collective bargaining agreements define 'membership,' which is a condition of employment in a union security agreement, as simply membership—and not the payment of periodic dues and initiation fees." William B. Gould IV, Campaign Finance Reform and the Union Dues Dispute Under *Beck*, Address at the Fall Meeting of the Iowa Chapter of the Industrial Relations Research Ass'n (Oct. 8, 1997), *in* NLRB Release-2259, at 3. According to one survey, "[u]nion shop provisions, requiring all employees in the bargaining unit to join the union and maintain membership as a condition of employment, appear in 64 percent of contracts." Lab. Rel. Rep. (BNA), *Labor Relations Expediter* 430:508 (Oct. 23, 1995).

Second, this Court's intervention is necessary to establish conclusively nationwide that employers and unions cannot lawfully mislead employees about their obligations in a "union-security" agreement. As NLRB Chairman Gould also has explained, "[g]enerally speaking, neither workers nor employers understand that 'membership' is what the Supreme Court has

defined it to be in its 1963 *General Motors* holding." Gould, *supra*, at 3; *see Electronic Workers Local 444*, 311 N.L.R.B. at 1037; Harry H. Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022, 1057-58 (1976).

Consequently, as even the Board has admitted, despite its approval of the facial validity of a clause that purports to require "membership," such a clause "is phrased in a way that would lead a reasonable employee to believe that full membership in good standing is required." *Electronic Workers Local 444*, 311 N.L.R.B. at 1040. And, as the Seventh Circuit said in *Wegscheid*, "the only realistic explanation for the retention of the statutory language in collective bargaining agreements . . . is to mislead employees about their right not to join the union," 117 F.3d at 990, and their right to only "pay dues and fees related to the union's core representational activities." *See Buzenius*, 124 F.3d at 792-93; *Bloom*, 30 F.3d at 1004-05.

C. The Court Should Grant This Petition Even If It Grants the *Buzenius* Petition, Because the Facial Validity Issue Is Presented More Completely Here.

As noted *supra* p. 9, a petition for certiorari filed by the union in *Buzenius* was docketed on December 8, 1997. That petition presents essentially the same question as the first question presented by this Petition, and cites the same conflict among the Circuits. (*See* Pet. for Cert. at i, 7-8, *Paperworkers Local 1033 v. Buzenius*, No. 97-945 (U.S. docketed Dec. 8, 1997).) However, this case more concretely presents the entire issue of the facial validity of compulsory unionism provisions that do not limit the obligations stated to those that can lawfully be enforced as a condition of employment.

The compulsory unionism provision in *Buzenius* only says that employees "'shall become and remain members of the Union in good standing as a condition of employment'" and "does not define 'member in good standing.'" 124 F.3d at 789. Thus, although the Sixth Circuit held that to be valid a "union-security

clause" must define its requirement as only that employees "pay that portion of dues related to core representational activities," *id.* at 793, this Court could find that clause facially invalid simply because it requires more than the payment of dues and initiation fees without deciding whether the *Beck* rights must be spelled out in the contract. The latter question cannot be avoided in this case, because the provision involved here requires every performer ***both*** "to be 'a member of the Union in good standing' ***and*** to pay periodic dues and initiation fees," (App. at 2a (emphasis added)).

Therefore, the Court should either grant certiorari only in this case, and deny it or summarily affirm in *Buzenius*, or grant certiorari in both cases and consider them together.

II. The Court of Appeals' Decision That Ms. Marquez's Unfair Representation Claim Concerning the Facial Validity of the Employment-in-the-Industry Requirement Is Within the NLRB's Exclusive Jurisdiction Conflicts With the Seventh Circuit's Holding That the Federal Courts Have Jurisdiction Over a Claim That a Union Has Misrepresented Employees' Section 8(a)(3) Obligations in a Collective Bargaining Contract.

The first proviso to NLRA section 8(a)(3) permits only compulsory unionism clauses that "require as a condition of employment membership . . . on or after the thirtieth day following the beginning of such employment." 29 U.S.C. § 158(a)(3), 1st proviso. Consequently, employees have a statutory, thirty-day grace period with every employment relationship.

An employee "'*who has become delinquent in dues under a contract covering one bargaining unit cannot be denied employment under a contract covering another bargaining unit* without affording him the statutory grace period in which to become current in his or her dues.'" *NLRB v. Iron Workers Local 433*, 767 F.2d 1438, 1442 (9th Cir. 1985) (quoting *Iron Workers Local 118*, 257 N.L.R.B. 564, 566 (1981), *enforced per curiam*, 720 F.2d 1031 (9th Cir. 1983)). Moreover, an employee has a

right to a new grace period when an employer rehires him or her unless the employee was delinquent in dues when previously employed by that employer. *Carpenters Local 740*, 238 N.L.R.B. 159, 160-61 (1978).

The agreement between SAG and Lakeside required "'as a condition of employment [by Lakeside] membership in the Union . . . thirty (30) days after [a person's] first employment as a performer ***in the motion picture industry***.'" (App. at 10a (emphasis altered).) Thus, the agreement failed to inform employees of the separate thirty-day grace period with each employment that is their statutory right, unless they were delinquent in their dues obligations in a prior employment with the same employer.

The Board held a similar clause facially invalid in *Theatrical Stage Employees Local 644*, 259 N.L.R.B. 1415 (1982). That clause required all cameramen employed by a producer to join the union "'not later than the 31st day following the beginning of their first employment,'" defined as "'the first such employment for producers under contract with Local 644.'" *Id.* at 1418. The NLRB held that the clause "clearly contravenes the statutory intent of Section 8(a)(3) of the Act," because it does "not provide for the statutory 30-day waiting period before requiring union membership." *Id.* at 1416, 1422. With "respect to any employee who . . . has completed 31 days of employment with any employer subject to its provisions, the provision constitutes a[n unlawful] closed shop and a bar to employment unless that employee continues to remain a member of the Union in good standing." *Id.* at 1422.

The court of appeals held that Ms. Marquez's claim concerning the facial validity of the "CBA's 30 day term is preempted by the NLRB's exclusive jurisdiction" over arguable unfair labor practice claims. (App. at 10a-13a.) Yet, at the same time, by deciding it, the court of appeals recognized that the district court had jurisdiction over Ms. Marquez's parallel claim that SAG breached the duty of fair representation by negotiating a compulsory unionism provision that "requires covered actors to be members of the union in good standing." (*See* App. at 6a-10a.)

The court of appeals correctly exercised jurisdiction over the latter claim, because the duty of fair representation "applies to all union activity, including contract negotiation," *Air Line Pilots Ass'n v. O'Neill*, 499 U.S. 65, 67 (1991); *see Beck*, 487 U.S. at 743. There are no exceptions to the rule that NLRB preemption "does not extend to suits alleging a breach of the duty of fair representation." *See Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 74-78 (1989).

No principled basis exists for distinguishing the claim the court of appeals adjudicated—that a union breached the duty of fair representation by negotiating a provision that on its face allegedly misleads employees about the ***extent*** of their lawful obligations to the union—from the claim it held to be pre-empted—that a union breached the same duty by negotiating a provision that allegedly misinforms employees as to ***when*** those obligations lawfully begin. *Cf. Abrams v. Communications Workers*, 59 F.3d 1373, 1380-81 (D.C. Cir. 1995) (holding that a union would violate the duty of fair representation if it collected full agency fees before new hires received notice of their right to pay only the *Beck* amount). The court of appeals' decision, thus, is internally inconsistent.

Moreover, through its remand to the district court for further proceedings on those claims, the court of appeals also acknowledged jurisdiction over Ms. Marquez's claims that SAG breached the duty of fair representation by, in its statements outside the collective bargaining agreement, misleading her about her obligations under section 8(a)(3), ***including by enforcing a policy that "required pre-payment of the dues before Marquez would be cleared to perform."*** (*See* App. at 13a-19a, *particularly* 15a-16a (emphasis added).)

In *Wegscheid*, the Seventh Circuit explicitly rejected this artificial distinction between claims that the terms of a collective

bargaining agreement misstate employees' obligations under section 8(a)(3) and claims that a union's statements outside the agreement about those same obligations are misleading:

> If an alleged violation of section 8(a)(3) is litigable in a district court suit challenging statements made outside the collective bargaining agreement as a breach of the union's duty of fair representation, and it is, we cannot think of any reason why it should not be litigable if the statements happen to be contained in the collective bargaining agreement, since the union's duty of fair representation can be violated by union conduct in the negotiation of a collective bargaining agreement, as well as in the enforcement of it.

117 F.3d at 989 (citations omitted). Thus, the court of appeals' decision here on this issue conflicts with the Seventh Circuit's decision in *Wegscheid*.

This question, too, is important. The employment-in-the-industry provision is not unique to SAG's contract with Lakeside. It is part of a standard contract that SAG negotiates with hundreds of motion picture and television producers. (*See* App. at 23a; Shapiro Decl. at 1-2, ¶¶ 2-3; Shapiro Dep. at 22-29.) Thus, thousands of performers are confronted with this provision each time they are employed by a motion picture or television producer who has a contract with SAG.

Moreover, as the Seventh Circuit recognized in *Wegscheid*, the court of appeals' preemption ruling here has a profound practical adverse effect on the ability of performers to challenge this limitation on their fundamental statutory right to freedom of association:

> since the [court of appeals] doesn't question the district court's jurisdiction over . . . the

> count complaining about statements made by the union's [agents] to the plaintiff[], the implication of the [court of appeals'] position is that to challenge both those statements and the language of the union-shop clause the plaintiff[was] required to proceed in two forums—the district court and the Labor Board—or else surrender [her] judicial claim and proceed exclusively before the Board.

117 F.3d at 989.

Therefore, the Court should grant certiorari on this question as well.

III. The Court of Appeals' Dismissal of the Employer Directly Conflicts With the Seventh Circuit's Disposition of the Same Issue in *Wegscheid* and Is a Question That Cannot Be Separated from the Two Other Questions Presented Here.

In *Bloom*, the Eighth Circuit held that "an adequate remedy" for a "misleading" and "overly broad" compulsory unionism clause "requires expunction of the offending clause." 30 F.3d at 1004-05; *accord Schreier v. Beverly Cal. Corp.*, 892 F. Supp. 225, 227 (D. Minn. 1995) (in a suit for breach of the duty of fair representation). In *Buzenius*, the Sixth Circuit ruled "that the Board abused its discretion in refusing to order that the clause requiring that employees be 'members of the Union in good standing' either be modified to define that requirement or be removed from the CBA." 124 F.3d at 793.

Ms. Marquez here asked for precisely that relief, *i.e.*, an

> injunction which requires SAG and Lakeside to expunge any provisions from their collective bargaining agreements . . . which require employees to be members as a condition of

> their employment, which impose membership or financial obligations upon employees during the first 30 days of their employment, and which require employees after the expiration of 30 days of employment to pay amounts which exceed a pro rata share of SAG's costs of "collective bargaining, contract administration, and grievance adjustment."

(Compl. at 7, ¶ IV.) Clearly, any such reformation of the contract cannot be compelled if Lakeside is not a party to this case.

Nonetheless, the court of appeals dismissed Lakeside, holding that Lakeside is not "a necessary party to obtain full relief through contract reformation, as the facial challenge to the CBA does not survive." (App. at 20a.) The Seventh Circuit reached precisely the opposite conclusion in *Wegscheid*, ruling that, even though the plaintiffs' facial claims were moot there, the employer "should not have been dismissed from the case, since the plaintiffs were asking the court to order a change in a contract to which [it] is a party." 117 F.3d at 988 (citing Fed. R. Civ. P. 19(a)(1)). That ruling is consistent with this Court's holding in *Glover v. St. Louis-San Francisco Ry.* that "federal courts may . . . properly exercise jurisdiction over ***both*** the union and the railroad" in a suit for breach of the duty of fair representation, if "the employer is made a party to insure complete and meaningful relief." 393 U.S. 324, 329 (1969) (emphasis added).

Because Lakeside is an indispensable party for the relief that would be appropriate should Ms. Marquez prevail on either of the first two questions presented, the Court should grant certiorari on this question as well.

CONCLUSION

This case presents issues that have great significance to the respective rights of individual employees, unions, and employers under the NLRA. There are direct conflicts between the decisions

of different courts of appeals on all questions presented, including a widespread conflict among several courts of appeals on the question of the facial validity of compulsory unionism provisions that purport to require employee obligations that cannot lawfully be enforced. Therefore, the Court should grant this Petition on all questions presented, and, if a writ also is issued in *Buzenius*, set the cases for argument consecutively or consolidate and hear them together.

Respectfully submitted,

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December 24, 1997

APPENDICES

APPENDIX A

DECISION OF THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

August 29, 1997

[124 F.3d 1034]
Naomi MARQUEZ, Plaintiff-Appellant,
v.
SCREEN ACTORS GUILD, INC., and Lakeside Productions, Inc., a foreign corporation, Defendants-Appellees.

No. 96-35566.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted July 7, 1997.

Decided Aug. 29, 1997.

* * *

[1035]Before: REAVLEY,* O'SCANNLAIN, and FERNANDEZ, Circuit Judges.

O'SCANNLAIN, Circuit Judge:

We must decide whether the Screen Actors Guild breached its duty of fair representation when it refused to clear a part-time actress for work because she could not pre-pay full union dues.

[1036]I

Naomi Marquez is a part-time actress, represented by agents Scott Thompson and Ingrid Fuhriman at the Thompson

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* The Honorable Thomas M. Reavley, Senior United States Circuit Judge for the Fifth Circuit, sitting by designation.

Media Talent agency. Lakeside Productions ("Lakeside") is the producer of a television series called "Medicine Ball," and is an employer within the meaning of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 152(2) (1988). Heidi Walker of Dixon/Walker Casting ("Dixon/Walker"), was hired by Lakeside to serve as the casting director for the "Medicine Ball" project.

The Screen Actors Guild ("SAG" or "the union") is a labor organization within the meaning of the NLRA. *See* 29 U.S.C. § 152(5). SAG was the exclusive bargaining agent for performers working for Lakeside on the "Medicine Ball" series.

Lakeside and SAG entered into a collective bargaining agreement ("CBA") which included a union security term providing that any actor who had previously worked more than 30 days in the motion picture industry was required to be "a member of the Union in good standing" and to pay periodic dues and initiation fees. To assure compliance with the CBA, Lakeside was required to call in the names of all performers for clearance by "Station 12," a regional division of SAG. SAG then informed the producers of each employee's dues obligations to the union and whether or not they were cleared to work in the performance.

On August 29, 1994, Marquez successfully auditioned for a small role in Lakeside's "Medicine Ball" series, and accepted the offer. Dixon/Walker, as the casting director and in keeping with its normal procedure, called in Marquez's name for clearance with Station 12. Marquez had previously worked for more than 30 days in the motion picture industry: five years earlier, in 1989, she worked more than 30 days on a movie that was covered by a SAG agreement. This 1989 employment triggered the union security term in the CBA, and Marquez was now required by the CBA to pay union initiation fees and dues to SAG.

There is a dispute over whether Station 12 informed Dixon/Walker that Marquez "must join" SAG, or whether the words used were "must pay" SAG, before she would be eligible to work in the production. Regardless of the term used, Marquez understood that she was required to pay SAG before she would be eligible to work. She called the Seattle SAG office to inquire into the cost of joining the union, and was told that the fee was about $500. She would receive $550 for her work in the production, to be paid 30 days after her performance. Marquez told her agents that she could not afford to pay the fee before being paid for the job. Her agents, Thompson and Fuhriman, said they would attempt to work something out.

Ingrid Fuhriman made several phone calls on Marquez's behalf to Lakeside, Dixon/Walker and SAG over the next few days. She called SAG headquarters in Los Angeles to try to work out an arrangement. Fuhriman asked whether Marquez could pay the fees after being paid by Lakeside, as she could not afford to pay ahead of time. An unidentified SAG employee in the membership department said that this would not be possible, and that Marquez must pay before being cleared for work. It was also suggested that if Marquez could not pay in advance she could have up to 14 days after filming to pay. The SAG employee said that it would not be possible to wait the 30 days that it would take to be paid for the acting job, nor to agree simply to sign over her check to SAG. Fuhriman next spoke with Vicki Shapiro, SAG's legal counsel, who verified this information. Shapiro further testified that Fuhriman did not mention Marquez by name, nor say that Marquez objected to joining the union.

Marquez then contacted Hugh Reilly at the National Right to Work Legal Defense Foundation. He drafted a letter explaining that, under federal law, Marquez could not be required to join a union as a condition of employment, that SAG could only require that she pay a pro-rated share for services provided to

all workers,[1] and that she was entitled to a 30-day grace period before any [1037]fees could be required. A draft of this letter was sent to Thompson Media on September 2nd, and was later faxed to Dixon/Walker on September 6. Lakeside also received a copy of the letter, which it faxed to SAG on September 7.

September 7th was also the day before Marquez was to perform in the production, and the deadline established by Station 12 for Marquez to pay the union dues. As she had not paid by the deadline, Lakeside hired another performer to replace her, and filming took place on the 8th. That same day, Vicki Shapiro, SAG's legal counsel, faxed a letter to Lakeside saying that it had no objection to Marquez working in the production. This letter arrived too late to be of assistance to Marquez, who lost the job.

Marquez filed suit against SAG and Lakeside in December, 1994. First, Marquez claimed that SAG breached its duty of fair representation owed to all workers covered by the agreement when it negotiated and enforced a CBA requiring more from employees than federal law permitted by: (1) requiring membership in the union; (2) demanding full payment of union dues of Marquez, rather than informing her of her right to pay a lesser "core" amount; and (3) and by failing to grant a 30 day grace period for each period of employment.

Secondly, she claimed that SAG and Lakeside breached "implied terms" from federal law which are implicitly part of all CBAs. Lakeside and SAG breached these terms, according to Marquez, in negotiating and enforcing the union security term. She requested declaratory, injunctive, and monetary relief under both claims, as well as attorneys fees. The district court granted

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[1] In its notice to fee-paying non-members, SAG informs those who decline union membership that they must pay 97.2% of the full union dues to cover representational services.

summary judgment to the defendants and Marquez filed this timely appeal.

II

As an exclusive bargaining representative of all employees in a bargaining unit, a union has a "statutory duty fairly to represent all of those employees" in the negotiation and enforcement of a collective bargaining agreement. *Vaca v. Sipes*, 386 U.S. 171, 177, 87 S.Ct. 903, 909, 17 L.Ed.2d 842 (1967). This duty is enforceable by courts, even if the alleged breach arguably could be considered an unfair labor practice under NLRA § 8(b)(1)(A) and therefore otherwise under the exclusive jurisdiction of the NLRB. *See Communications Workers of America v. Beck*, 487 U.S. 735, 743, 108 S.Ct. 2641, 2647, 101 L.Ed.2d 634 (1988).

The duty of fair representation has been likened to a fiduciary duty owed by the union to all employees "to represent them adequately as well as honestly and in good faith." *Air Line Pilots Ass'n Int'l v. O'Neill*, 499 U.S. 65, 75, 111 S.Ct. 1127, 1133, 113 L.Ed.2d 51 (1991). The duty applies to "challenges leveled not only at a union's contract administration and enforcement efforts but at its negotiation activities as well." *Beck*, 487 U.S. at 743, 108 S.Ct. at 2647 (internal citation omitted).

A union breaches the duty of fair representation when "a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca*, 386 U.S. at 190, 87 S.Ct. at 916. The Supreme Court has enunciated a highly deferential standard for reviewing the substantive results of a union's negotiation efforts, which should be evaluated "in light of both the facts and the legal climate that confronted the negotiators at the time the decision was made." *O'Neill*, 499 U.S. at 78, 111 S.Ct. at 1135.

> [T]he final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness' ... that it is wholly 'irrational' or 'arbitrary.'

Id. (internal citation omitted).

Marquez argues that SAG breached its duty of fair representation by negotiating and entering into a CBA with two unlawful terms: the union security clause and a 30-day term. Each contention will be dealt with in turn.

A

SAG and Lakeside entered into a collective bargaining agreement ("CBA") with a union security term which provides: "Every **[1038]**performer hereafter employed by any Producer ... shall be a member of the Union in good standing."[2] Marquez contends that the union acted arbitrarily and in bad faith in negotiating this term because unions may not legally require full union membership as a condition of employment. We disagree.

The NLRA by its very terms allows the inclusion of a union security term requiring union "membership." At the same time,

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[2] During the pendency of this suit, the parties amended the CBA to read as follows:

> As defined and applied in this section, the term 'member of the Union in good standing' means a person who offers to pay (and if the Union accepts the offer, pays) union initiation fees and dues as financial obligations in accordance with the requirements of the National Labor Relations Act.

As Marquez's alleged injury was caused by the enforcement of the agreement before its amendment, we will construe the CBA as it existed at the time giving rise to the cause of action. *See Teachers Local 1 v. Hudson*, 475 U.S. 292, 305 n. 14, 106 S.Ct. 1066, 89 L.Ed. 232 (1986).

the concept of "membership" in CBAs has become a term of art: unions can require no more than payment of initiation fees and dues covering a "financial core" of services provided to all employees. *See NLRB v. General Motors Corp.*, 373 U.S. 734, 742, 83 S.Ct. 1453, 1458, 10 L.Ed.2d 670 (1963). This core amount is limited to expenditures germane to "collective bargaining, contract administration, and grievance adjustment." *Beck*, 487 U.S. at 745, 108 S.Ct. at 2648.

First, § 8(a)(3) of the NLRA provides that an employer may not "encourage or discourage membership in any labor organization; Provided that nothing shall ... preclude an employer from making an agreement with a labor organization ... to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment...." 29 U.S.C. § 158(a)(3). The second proviso to § 8(a)(3) suggests that payment of "uniformly required" dues and fees will satisfy the membership requirement. *Id.* The Act further provides that no union may attempt to "cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a)(3)...." 29 U.S.C. § 158(b)(2).

The Supreme Court has interpreted these provisions as an attempt by Congress to avoid the twin evils of compulsory unionism and employee free-riders, both of which are inherent risks of an exclusive bargaining arrangement. *See Beck*, 487 U.S. at 749, 108 S.Ct. at 2650. Section 8 strikes a balance with the following compromise: unions cannot force objectors to join as a condition of employment, but they can require that objectors pay for those core services which benefit all employees. *Id.*

> Taken as a whole, § 8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but the 'membership' that may be so required has been 'whittled down to its financial core' ... [support-

ing] collective bargaining, contract administration, and grievance adjustment.

Id. at 745, 108 S.Ct. at 2648.

Marquez reasons that SAG breached the duty of fair representation by negotiating a CBA which continued to purport to require full union membership after *Beck*. She contends that the CBA's term is misleading to employees who do not know that federal law has limited their mandatory union obligation to the "financial core" outlined in *Beck*. Because SAG must have known that *Beck* does not permit mandatory union membership beyond the payment of "core" fees, its inclusion of the membership requirement in the CBA was an "arbitrary" or "bad faith" breach of the duty of fair representation according to Marquez.

Two of our sister Circuits have recently considered and rejected claims from plaintiffs who, like Marquez, wished to require unions to re-phrase their CBA's to reflect this "financial core" limitation on the concept of "membership." The courts held that terms requiring union "membership" continue to be permissible under federal law. *See International Union Electronic, Electrical, Salaried, Machine and Furniture Workers v. NLRB*, ("*IUE* ") 41 F.3d 1532 (D.C.Cir.1994); *Nielsen v. International Association of Machinists*, 94 F.3d 1107 (7th Cir.1996), [1039]*cert. denied*, ___ U.S. ___, 117 S.Ct. 1426, 137 L.Ed.2d 536 (1997); *but see Bloom v. NLRB*, 30 F.3d 1001, 1005 (8th Cir.1994) ("Because the overly broad union security clause was unlawfully interpreted and applied, an adequate remedy requires expunction of the offending clause.").

In *IUE*, the D.C. Circuit reversed a determination by the NLRB that a union acted in "bad faith" by negotiating a union security agreement requiring employees to "join the union" and "remain members of the Union in good standing as a term and condition of employment." *IUE*, 41 F.3d at 1535. The Board

held that this language had become ambiguous because of legal glosses on the term, and could mislead employees about the extent of their obligations to the union. By maintaining this provision without explaining that the union could demand no more than the payment of "core" dues and fees, the Board held, the union breached its duty of fair representation. *Id.* at 1537.

The D.C. Circuit reversed, holding that there was no showing of a bad faith breach of the duty of fair representation under the *Vaca* standard because identical union security provisions had never previously been found to be "ambiguous" or misleading. A "bad faith" violation requires a showing of "fraud, deceitful or dishonest action." *IUE*, 41 F.3d at 1537. No such showing was possible in IUE because the NLRB had always permitted such membership terms in the past.

Marquez argues that *IUE* only ruled that there was no "bad faith" violation of the fair representation duty, while leaving open the question of whether such terms may constitute breach of the duty under the "arbitrary" prong of *Vaca*. However, the Seventh Circuit has rejected this claim in adopting the approach of *IUE*:

> We agree with the D.C. Circuit and the NLRB that *Beck* did not, either explicitly or implicitly, call into question the facial validity of union security clauses.... In this case, as in *IUE* there is no evidence whatever that the union acted arbitrarily, discriminatorily, or in bad faith, within the meaning of *Vaca* and *O'Neill* when it negotiated the agency shop clause....[3]

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[3] The CBA clause at issue in *Nielsen* provided:

> As a condition of continued employment, all employees ... shall either become a member of the Union and pay dues thereto, or ... shall pay an amount equal to the Union's initiation fee and ... dues.

Nielsen, 94 F.3d at 1115.

We affirm the district court's conclusion that SAG did not breach its duty of fair representation by negotiating a CBA which requires covered actors to be members of the union in good standing.

B

The CBA between Lakeside and SAG also includes the following provision:

> B. The foregoing subsection A., requiring as a condition of employment membership in the Union, shall not apply until on or after the thirtieth day following the beginning of such employment ...; the Union and the Producers interpret this sentence to mean that *membership in the Union cannot be required of any performer by a Producer as a condition of employment until thirty (30) days after his first employment as a performer in the motion picture industry*. (emphasis added)

Marquez argues that this term is a misapplication of the first proviso of NLRA § 8(a)(3). That section provides:

> [N]othing ... shall preclude an employer from making an agreement with a labor organization ... to require as a condition of employment *membership therein on or after the thirtieth day following the beginning of such employment* ....

29 U.S.C. § 158(a)(3) (emphasis added).

Nielsen, 94 F.3d at 1109-10. The union also had procedures to notify employees of their rights under *Beck* to pay only the core financial amounts. *Id.*

Marquez contends that the statute's term "such employment" is interpreted by the Board to mean each separate employment relationship, *see Theatrical Stage Employees Local 644*, 259 N.L.R.B. 1415, 1422, 1982 WL 24170 (1982), and that SAG therefore breached its duty of fair representation by negotiat**[1040]**ing a term that required more than the statute permits. SAG counters that because of the unique circumstances of multiple short term jobs in the motion picture industry, "such employment" can legitimately be interpreted to mean "employment in the industry."

The district court held that this claim is preempted by the NLRA because it is nothing other than an unfair labor practices claim, depending entirely on the question of the proper interpretation of § 8(a)(3). It is therefore within the primary jurisdiction of the NLRB. *See San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244, 79 S.Ct. 773, 778, 3 L.Ed.2d 775 (1959). Marquez counters that she is not making a direct allegation that SAG engaged in an unfair labor practice within the meaning of the NLRA. Rather she argues that inclusion of the 30-day term in the CBA violates the union's judicially enforceable duty of fair representation because it requires more of employees than is permissible under authoritative interpretations of the statute. Under this approach the question would be within the jurisdiction of federal courts to enforce like any other fair representation claim.

Marquez is correct that federal courts will exercise jurisdiction over claims alleging breach of a union's duty of fair representation even if those claims also involve an arguable violation of § 8(a)(3). *See Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 75, 110 S.Ct. 424, 429, 107 L.Ed.2d 388 (1989) (that "a breach of duty of fair representation might also be an unfair practice is ... not enough to deprive a federal court of jurisdiction over the fair representation claim"). In *Beck*, for instance, the Supreme Court found that jurisdiction was proper over a claim alleging that the union breached its duty of fair

representation by requiring non-members to contribute to services to which the employees objected. This fair representation claim was not preempted even though it involved an interpretation of the proper scope of § 8(a)(3). *See Beck*, 487 U.S. at 743, 108 S.Ct. at 2647.

However, the *Beck* court specifically warned federal courts not to be hoodwinked by a plaintiff's attempt to side-step the exclusive jurisdiction of the NLRB over unfair labor practices claims in this manner.

> Federal courts may resolve unfair labor practice questions that 'emerge as collateral issues in suits brought under independent federal remedies' ... [such as] the judicially implied duty of fair representation.... Employees, of course may not circumvent the primary jurisdiction of the NLRB simply by casting statutory claims as violations of the union's duty of fair representation.

Id. (internal citations omitted).

The court went on to explain that the employees' fair representation claim in *Beck* was not a disguised unfair practices claim, and that the "necessity of deciding the scope of § 8(a)(3) arises because [the union] seek[s] to defend themselves on the ground that the statute authorizes precisely this type of agreement." *Id.*

Discerning a principled distinction between a disguised unfair labor practices claim and a straightforward breach of duty claim is no simple matter, as any unfair labor practice can also be styled as a breach of the duty of fair representation. However, we agree with the district court that Marquez's challenge to the CBA's 30-day provision is preempted. Unlike the question presented in *Beck*, the challenge to SAG's interpretation of the 30-day grace period required by the NLRA does not raise the § 8(a)(3) claim as a collateral issue in an otherwise straightforward fair representation claim. Her claim rests squarely upon the proper interpretation of § 8(a)(3): if the CBA's 30-day term is proper under § 8(a)(3) then SAG wins; if not Marquez prevails.

We have previously explained our traditional deference to the NLRB in interpreting the requirements of the NLRA to unique fact situations:

> The desire to protect the primary jurisdiction of the NLRB flows from the need to maintain centralized administration of the NLRA by a specialized agency. Labor law involves many difficult questions of policy best left to the agency that has the expertise to solve them.... [T]he risk of interference with the NLRB's central ad**[1041]**ministration is great where the controversy presented to the court is one 'which could have been, but was not presented to the Labor Board.'

Burke v. French Equipment Rental, Inc., 687 F.2d 307, 311 (9th Cir.1982) (internal citation omitted). The factually complex question of how properly to apply § 8(a)(3)'s requirements to hiring practices in the motion picture industry is precisely the kind of question that we think the NLRB was designed to address.

We affirm the district court's conclusion that Marquez's challenge to the CBA's 30 day term is preempted by the NLRB's exclusive jurisdiction.

III

The district court also granted summary judgment to SAG on Marquez's claim alleging breach of the duty of fair representation in the enforcement of the union security term. Although there were some discrepancies in the record, the court held that no reasonable jury would conclude that SAG's actions amount-

ed to a bad faith attempt to enforce the CBA beyond its legal limits.

In reviewing a summary judgment order we must "determine, viewing the facts in the light most favorable to the non-moving party, whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Fuller v. City of Oakland*, 47 F.3d 1522, 1534 (9th Cir.1995).

A

The record contains conflicting evidence with regard to whether SAG representatives impermissibly asserted that Marquez was required to "join" the union before she would be eligible to work or whether the term used was must "pay" the union. The contemporaneous typed notes by a Dixon/Walker casting assistant indicate that the Station 12 employee listed Marquez's status as "must join," and her talent agents who spoke with the casting agency said that this was the term used.

Later typed notes and a Station 12 written confirmation letter used the term "must pay," and SAG and Dixon/Walker casting employees testified that this was the term used. There was also evidence of some confusion over the term used because this was a period of transition between the "must join" and "must pay" terminology. SAG further argues that because Marquez's talent agents may have known that nothing more than payment of the fees was required, Marquez should have been on notice that she was not required to actually "join" the union. Even were this so, SAG's duty of fair representation runs directly to Marquez as an employee covered by an exclusive bargaining arrangement. If SAG asserted that Marquez was required to join the union as a condition of employment this would, of course, implicate its duty of fair representation owed to her.

The record is also unclear as to whether SAG policy required pre-payment of the dues before Marquez would be cleared to perform in the production. Station 12 employees repeatedly warned that Marquez was required to pay the dues and fees before she would be cleared. When Marquez's agent contacted SAG headquarters and outlined the impossibility of pre-payment, she was told that SAG would allow no more than 14 days for payment of the full amount. When challenged by a lawyer's letter threatening legal action, SAG faxed a letter to Lakeside on the day Marquez's replacement was filmed in her part, stating that SAG had no objection to Marquez performing in the production.

Obviously, each of these positions is mutually exclusive: either Marquez was required by SAG policy to pay before she was allowed to work as Station 12 suggested, or she was required to promise to pay within two weeks of working (though her request for 30 days to pay was specifically refused), or SAG had no objection to Marquez working in the production and would arrange for payment later. If the policy was actually to permit actors to work on SAG-covered jobs while working out a payment plan later, then SAG may have breached its duty by misinforming Marquez and the production staff that she would not be cleared to work on the project until she paid the union in full. If the policy was in **[1042]**fact to require full payment before permitting an actor to work, this policy may also implicate the duty of fair representation under the arbitrariness prong of *Vaca*.

Finally, it is unclear from this record whether SAG gave Marquez notice that she would be obligated to pay some fees and dues when she had her first contact with the union. Marquez testified at a deposition that when she worked on a SAG-covered job in 1989 she had been required to fill in various union forms and was told that she was not obligated to pay any SAG fees as a condition of employment in that role. The record does not reflect whether she received notice at that time

of SAG's interpretation of the 30-day rule, or that the next time she wished to work on a SAG-covered job she would be required to pay fees once she had worked "in the industry" more than thirty days.

As these genuine issues of material fact remain to be resolved with regard to SAG's enforcement of the CBA, we reverse the district court's summary judgment order over Marquez's claim that SAG breached its duty of fair representation in enforcing the CBA.

B

The district court does not appear to have considered Marquez's allegations that SAG's failure to notify all employees of their right to pay the lesser "core" fees under *Beck* violates the duty of fair representation. Those Circuits which have upheld the facial validity of union security clauses have suggested that, because a CBA's membership requirement may be misleading, the unions have a duty to inform workers of the "core" payment option. *See, e.g., Abrams v. Communication Workers of America*, 59 F.3d 1373, 1379 (D.C.Cir.1995) (rejecting facial challenge to union security term, but requiring adequate notice of right to pay "core" fees and to challenge the "core" amount); *Nielsen* 94 F.3d at 1114 (problems might arise only if a union were to fail to provide appropriate notice to employees); *Id.* at 1115 (rejecting claim of unfair enforcement because notice of right to object was adequate and procedure for objecting was fair).

We have previously held that unions have a duty to inform workers of the steps they must take to retain their jobs before the union may request that an employer terminate their employment. See, *e.g., Sheet Metal Workers' Local 355 v. NLRB*, 716 F.2d 1249, 1254 (9th Cir.1983) (union has duty of to give employee clear notice of steps necessary to protect job tenure); *NLRB v. Teamsters Local 291*; 633 F.2d 1295, 1298-99 (9th

Cir.1980) (union must give notice to employee before requesting discharge even if employee knew of his obligation to pay dues and the consequences of failing to pay). When an employee's job is at risk for failure to meet union dues obligations, the union "must deal fairly" with the employee. *Sheet Metal Workers'*, 716 F.2d at 1254 (quoting *Macaulay Foundry Co. v. NLRB*, 553 F.2d 1198, 1201 (9th Cir.1977)).

We think this duty may well include a requirement to inform workers of the minimal requirements with respect to the payment of only "core" dues and fees under *Beck*. The alternative position would mean that unions may demand more than federal law requires, while waiting for uninformed employees to request the "core" payment option. Surely the unspoken hope that employees will pay the full amount without question, which is the only plausible reason for failing to give such notice, does not constitute treating all employees fairly.

The only record facts relating to notice of employee's rights to pay less than 100% of the union's dues appear in an affidavit from Leonard Chassman, Hollywood Executive Director of SAG. He states that SAG "sends notices to all performers who notify SAG that they decline membership, either by resigning or refusing to join in the first instance, of their rights under federal labor law." Attached to the affidavit is a copy of the notice: it informs objectors that 1) they must pay dues if they intend to perform for employers who are signatories to their CBA; 2) they have the right to object to payment of dues for non-representational ("non-core") activities; 3) the representational ("core") activities dues are 97.2% of Guild dues.

SAG claims that it has an adequate system for "notifying all nonmember employees who **[1043]**make payments pursuant to its union security clause of their right to object and pay only the collective bargaining portion of the agency fee." The union

explains that Marquez never received this notice because SAG was never told that Marquez did not wish to join the union.[4]

We remand this question to the district court to consider whether SAG's apparent lack of notice to all employees of the "core" payment option, in conjunction with the Marquez's other allegations, constituted an arbitrary breach of the duty of fair representation "in light of the factual and legal landscape at the time of the union's actions," *O'Neill*, 499 U.S. at 67, 111 S.Ct. at 1129.

C

Finally, Marquez argues that the district court erred in failing to consider her claim that SAG breached its duty under the arbitrary prong of *Vaca* in its enforcement of the CBA. The district court's order does not address the arbitrariness analysis, although Marquez did include this argument in her opposition to summary judgment.

In explaining *Vaca*'s arbitrariness standard we have held that even unintentional acts and omissions may constitute a breach of the duty of fair representation. "[U]nintentional acts or omissions by union officials may be arbitrary if [1] they reflect reckless disregard for the rights of an individual employee, ... [2] they severely prejudice the injured employee, ... and [3] the policies underlying the duty of fair representation would not be served by shielding the union from liability in the circumstances of the particular case." *Robesky v. Qantas*

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[4] We find no merit in SAG's alternative claim that Marquez had not accepted Lakeside's offer of employment. The record is clear that all understood that she had accepted the role and that only SAG's refusal to clear her for work stood in the way of her performance.

Empire Airways Ltd. 573 F.2d 1082, 1090 (9th Cir.1978) (internal citations omitted).

There are several related factual allegations involved in Marquez's claim that SAG acted arbitrarily in enforcing the union security term. These allegations should be considered together to determine whether there was a breach under the totality of circumstances. *See Castenada v. Dura-Vent*, 648 F.2d 612, 618 (9th Cir.1981) (instructing district court on remand to consider the totality of union's acts in determining whether it breached duty of fair representation).

While SAG argues that Marquez will not be able to satisfy *Robesky*'s three-part test, we nevertheless remand this question to the district court to consider it in conjunction with the other factual allegations in this claim. *See Robesky*, 573 F.2d at 1091 (remanding for district court to consider claim that union acts satisfied test for arbitrary breach of duty of fair representation).

D

To summarize, we reverse the district court's summary judgment order as to Marquez's claim that SAG's enforcement of the CBA breached the duty of fair representation because disputes over genuine issues of material fact preclude summary judgment, and because the court failed both to address a portion of Marquez's allegations in considering the enforcement claim, and to conduct an analysis of Marquez's breach claim under the arbitrariness standard of *Vaca*. We remand for resolution of these matters.

IV

Marquez's second claim for relief against Lakeside and SAG is brought under § 301 and alleges that the defendants together breached implied federal law terms of the CBA when Lakeside replaced Marquez because SAG had not cleared her

to work on the production. This claim alleges: (1) that the NLRA does not permit CBAs to require membership obligations, payment of dues for the first 30 days of employment, or payments in excess of core amounts; and (2) SAG and Lakeside violated these implied-in-law rights of employees because they "maintain and enforce their [CBA's] against employees ... which on their face and as applied violate" the NLRA's limitations.

We have already concluded that the union security term does not violate federal law and that the CBA's interpretation of the [1044]NLRA's 30-day grace period is within the exclusive jurisdiction of the NLRB. This reasoning applies with equal force to Marquez's contention that Lakeside and SAG breached implied terms of the CBA by maintaining a CBA with these provisions.

The only remaining claim against SAG is the alleged breach of the duty of fair representation in its enforcement of the CBA. Marquez argues that because Lakeside is "implicated" in SAG's allegedly wrongful conduct, Lakeside should also be held liable for SAG's breach of the duty of fair representation. We disagree.

Marquez argues that Lakeside is implicated in SAG's alleged failures in fairly representing her because it "aided and abetted" SAG by hiring a casting director who cleared employees through Station 12, and by replacing her in the role when SAG did not clear her for work. She does not claim, however, that Lakeside had any affirmative duties to inform Marquez of her rights with regard to paying union dues or that Lakeside impermissibly sought to force her to join the union. *See Nielsen*, 94 F.3d at 1117 (dismissing employer from § 301 suit claiming breach of union's duty of fair representation in negotiation and enforcement of union security term). Nor is Lakeside a necessary party to obtain full relief through contract reformation, as the facial challenge to the CBA does not survive.

We therefore affirm the district court's dismissal of the breach of contract claim.[5]

V

We affirm the district court's order of summary judgment as to Marquez's claim that SAG breached its duty of fair representation by negotiating the CBA's union security term. We also affirm the court's dismissal of Marquez's second claim alleging that SAG and Lakeside breached implied terms of the CBA. However, we reverse summary judgment on Marquez's claim that SAG arbitrarily or in bad faith breached its duty of fair representation in the enforcement of the CBA, and remand for further proceedings consistent with this opinion.

AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings.

Each party to pay its own cost.

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[5] Because we affirm summary judgment on Marquez's second claim, we do not reach the question of whether Marquez was required to exhaust contractual remedies before bringing this claim.

APPENDIX B

ORDER OF THE UNITED STATES

DISTRICT COURT FOR THE

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

April 16, 1996

[Clerk's Stamp Omitted in Printing]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NAOMI MARQUEZ,	)	
	)	
Plaintiff,	)	NO. C94-1831R
	)	
v.	)	ORDER GRANTING
	)	DEFENDANTS'
SCREEN ACTORS GUILD and	)	MOTION FOR SUM-
LAKESIDE PRODUCTIONS,	)	MARY JUDGMENT
INC., a foreign corporation,	)	AND DENYING
	)	PLAINTIFF'S MO-
Defendants.	)	TION FOR SUM-
	)	MARY JUDGMENT

THIS MATTER comes before the court on the parties' cross-motions for summary judgment. Having considered all of the documents filed in support and in opposition to the motions, and being fully advised, the court finds and rules as follows:

I. BACKGROUND

The following facts are undisputed by the parties: On August 29, 1994, plaintiff Naomi Marquez ("Marquez") auditioned for a one-line television acting role for an episode of a television series "Medicine Ball" produced by defendant Lakeside Productions, Inc. ("Lakeside"). The terms and conditions of employment for performers employed by Lakeside were governed by a collective bargaining agreement entered into by Lakeside and the Screen Actors Guild, Inc. ("SAG" or the "Union"), discussed more below.

SAG is a labor organization that represents actors and actresses and others in the motion picture and television industry. In July 1994 Lakeside became a signatory to the SAG 1992 Memorandum of Agreement between Independent Motion Picture and Television Producers, binding Lakeside to several SAG collective bargaining agreements. The Memorandum stated that the SAG Codified Basic Agreement of 1989 for Independent Producers, the SAG Television Agreement of 1989 for Independent Producers and the 1992 Memorandum of Understanding would govern the terms and working conditions of performers employed by Lakeside. The agreements are referred to herein as the Collective Bargaining Agreement (the "CBA").

The CBA contains a "union security" provision that states that a performer who works under the agreement shall be a "member of the Union in good standing." Subpart 2A, CBA. In addition, the CBA contains a provision stating that the union security provision

> shall not apply until on or after the thirtieth day following the beginning of such employment . . . and the Producers shall interpret this sentence to mean that membership in the Union cannot be required of any performer by a Producer as a condition of employment until thirty (30) days after his first employment as a performer in the motion picture industry; . . .

Subpart 2B, CBA.

Marquez's talent agency, Thompson Media Talent ("TMT") arranged with Dixon Walker Casting for Marquez to audition on August 29, 1994 for a one-line role in Lakeside's production of the television series "Medicine Ball." On August 31, 1994, Marquez was informed by her agent at TMT, Ingrid Fuhriman, that Lakeside wanted Marquez for the role and that filming would occur on September 8, 1994.

Prior to August 1994, Marquez had not joined SAG. Her resume, however, did state that she was "SAG eligible." A casting agent at Dixon Walker who helped conduct the auditions for "Medicine Ball," Deedra Ricketts, understood the phrase "SAG eligible" to mean that an applicant promises to "join the union or make compliances with the union the next time [he or she] work[s] on a union show." p. 82, Ricketts Depo. Scott Thompson, one of Marquez's agents, explained that a performer puts the phrase "SAG eligible" on his or her resume to "hopefully, increase [her] chances of securing work." pp. 24, 79, Thompson Depo.

Marquez had performed in a motion picture in 1989. A SAG collective bargaining agreement was in place for that project. Marquez's employment in that motion picture continued for over one calendar month.

On August 31, 1994, Ricketts of Dixon Walker Casting called Station 12 of SAG (an office of SAG) to check the status of all of the performers being considered for the episode of "Medicine Ball." Ricketts was informed that Marquez was a "must-pay," i.e. that the CBA required her to pay the equivalent of uniform union dues and fees. pp. 48-49, 83-84, Ricketts Depo. During her deposition testimony, Ricketts clearly affirmed that she recollected being told that Marquez was a "must-pay," as opposed to a "must-join" applicant. In addition, the typed phone logs indicate that Ricketts was told by SAG Station 12 that Marquez was a "must-pay." pp. 48-49, Ricketts Depo. Additionally, written confirmation given by Station 12 to Ricketts noted Marquez as "MUSTPY." Ricketts testified that she understood this was an abbreviation for "must-pay."

That same day Ricketts spoke with Station 12, she called Thompson of TMT and informed him that Marquez was a "must-pay" because of her previous motion picture industry work. Id. at 48. Marquez understood that she would need to pay the amount required under the CBA prior to the scheduled date of

the performance. p. 49, Persons Depo., pp. 29-32 Marquez. Depo.

Scott Thompson indicated at his deposition that he was told by Ricketts that Marquez was a "must-join" but also testified that his "understanding was that 'must-join' meant paying the required financial obligation." p. 30, Thompson Depo. Thompson testified that he was not aware of other aspects of what "must-join" or "must-pay" would mean. Id.

Marquez called SAG's office in Seattle, and asked about the cost of joining the Union. She did not relay any information about her particular situation. This was Marquez's sole personal contact with SAG. She testified at her deposition that the SAG representative did not misrepresent any facts nor did he treat her in a hostile manner. pp. 56-58, Marquez Depo. Marquez then called her agent Fuhriman, and told her she would not be able to accept the part offered her because she did not have sufficient funds to pay the SAG fees. p. 29, Marquez Depo. Fuhriman replied that perhaps something could be arranged with the Union. Id. at 29-30.

Fuhriman contacted the SAG office in Seattle to discuss the issue. Without mentioning Marquez by name, Fuhriman spoke to a SAG representative about the dues required of a Washington actor, p. 32, Fuhriman Depo., and the "possibility of working something out so Ms. Marquez would pay the dues and fees that were required . . . " Id. at 88.

Based upon a referral by Fuhriman, Marquez contacted the National Right to Work Foundation and spoke with an attorney

there named Hugh Reilly.[1] After speaking with Fuhriman and Marquez, Reilly drafted a letter to Dixon Walker Casting, which he circulated to TMT and Marquez on September 2, 1994. p. 57, Fuhriman Depo.; p. 24, Thompson Depo. The letter stated that "labor agreements Dixon-Walker and/or Lakeside have preclude [Marquez] from fulfilling the engagement unless she joins and pays dues or initiation fees to the union." On September 6, 1994, two days before the scheduled performance, Reilly mailed the same letter to Heidi Walker of Dixon Walker Casting and sent a copy to Lakeside Productions. The letter was never sent to SAG by Marquez, Reilly, or any other representative of Marquez.

Lakeside received Reilly's letter late on September 6, 1994 and the following day faxed a copy of it to Vicki Shapiro at the SAG office. Shapiro's assistant called her at a meeting the afternoon of September 7 to inform her of the issue. This was the first that Shapiro learned of Marquez's situation. The following day, September 8, 1994, Shapiro faxed a letter to Lakeside Productions, stating that SAG had no objection to the employment of Marquez in "Medicine Ball."

At no point has Marquez or any of her representatives filed a grievance against Lakeside. p. 53, Marquez Depo. Marquez has never requested that SAG file a grievance on her behalf, nor has she requested that SAG investigate whether a grievance should be filed against Lakeside. Id.

Marquez alleges that SAG breached its duty of fair representation to her. Specifically, Marquez alleges that SAG's union security clause was unlawful and that SAG breached its duty of fair representation by unlawfully maintaining and enforcing the

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[1] The National Right to Work Foundation is described in Marquez's brief as an organization that "provides free legal assistance to workers subjected to compulsory unionism provisions." p. 2, Plaintiff's Brief in Support of Summ. Judg.

union security clause. In addition, Marquez alleges that SAG and Lakeside breached the CBA by applying the union security provision to her. Finally, Marquez alleges monetary damages totaling $555.00.

II. DISCUSSION

A. Summary Judgment Standard

A grant of summary judgment is appropriate if it appears, after viewing the evidence in the light most favorable to the opposing party, that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assn., 809 F.2d 626, 630-31 (9th Cir. 1987); Lew v. Kona Hospital, 754 F.2d 1420, 1423 (9th Cir. 1985). A genuine issue of material fact is one where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

Summary judgment is also appropriate if the nonmoving party has the burden of proof at trial on an element essential to its case, and the nonmoving party fails to make a showing sufficient to establish a genuine dispute of fact as to the existence of that element. California Architectural Bldg. Prod. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987).

For a nonmoving party to withstand a summary judgment motion, it must show that there are genuine issues of material fact that can only be resolved by a finder of fact because they may reasonably be resolved in favor of either party. Id.

B. Marquez's Breach of the Duty of Fair Representation Claims

1. SAG's Alleged Breach of the Duty of Fair Representation By Entering into and Maintaining the CBA with Lakeside

Marquez alleges that SAG breached its duty of fair representation "by arbitrarily and in bad faith negotiating" the CBA entered into between SAG and Lakeside.

A union breaches its duty of fair representation when its conduct toward a member[2] is "arbitrary, discriminatory, or in bad faith." Air Line Pilots Ass'n v. O'Neill, 499 U.S. 65, 67 (1991); Vaca v. Sipes, 386 U.S. 171, 190 (1967). Allegations of "mere negligence . . . would not state a claim for breach of the duty of fair representation, . . ." United Steelworkers v. Rawson, 495 U.S. 362, 372-73. Bad faith can be established by showing that the union's actions were "sufficiently egregious or so intentionally misleading [as] to be invidious." O'Neill v. Air Line Pilots Ass'n, 939 F.2d 1199, 1203 (5th Cir. 1991) (internal quotations omitted).

Section 8(a)(3) of the National Labor Relations Act (the "NLRA"), 29 U.S.C. § 158(a)(3), permits an employer and the employees' bargaining representative (i.e., the Union) to enter into an agreement requiring employees in the bargaining unit to pay union dues and initiation fees, whether or not the employees wish to become full union members. IUE v. NLRB, (Paramax Systems), 41 F.3d 1532, 1534 (D.C. Cir. 1994).

Section 8(a)(3) reads as follows:

> [It shall be an unfair labor practice for an employer—]

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[2] The parties do not dispute that the duty of fair representation extends to Marquez, a job applicant.

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining until covered by such agreement when made, . . .

29 U.S.C. § 158(a)(3) (emphasis added).

The Supreme Court has determined that the Section 8(a)(3) "membership" which may be required of an employee has been "whittled down to its financial core," NLRB v. General Motors Corp., 373 U.S. 734, 742 (1963), and does not require employees "to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." Communications Workers v. Beck, 487 U.S. 735, 745 (1988).

As the D.C. Circuit Court of Appeals held in relation to a similar union security clause, "so long as a union does not attempt to enforce the agreement [the CBA] beyond its lawful requirement that employees pay only uniform initiation fees and dues, [such union-security] agreements are perfectly lawful under Section 8(a)(3)." Paramax Systems, 41 F.3d at 1538.

Marquez's allegations do not create any material dispute of fact sufficient to withstand summary judgment on this issue. Although Marquez argues that there is a dispute as to what her

agents were told by SAG officials,[3] the court finds that she has "fail[ed] to make a showing sufficient to establish a genuine dispute of fact as to the existence of" those facts, California Architectural Bldg. Prod. v. Franciscan Ceramics, Inc., 818 F.2d 1466, 1468 (9th Cir. 1987), and that the issues surrounding what her agents were told cannot "reasonably be resolved in favor of [plaintiff]." Id., at 1468. The court finds that no reasonable trier of fact could find that SAG "attempt[ed] to enforce the agreement [the CBA] beyond its lawful requirement that employees pay only uniform initiation fees and dues . . ." Paramax Systems, 41 F.3d at 1538.[4] Therefore, SAG is entitled to summary judgment on this claim.

2. SAG's Alleged Breach of the Duty of Fair Representation By its Application of the 30-Day Grace Period Provision

Marquez also alleges that SAG breached the duty of fair representation to her because SAG allegedly unlawfully enforced the 30-day grace period provision of the union security clause.[5]

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[3] Marquez argues that her agents may have been told by SAG that Marquez was a "must-join" as opposed to a "must-pay" applicant. However, Marquez's representatives' own testimony refutes this.

[4] The court declines to follow Bloom v. N.L.R.B., 30 F.3d 1001 (8th Cir. 1994), an unfair labor practice case decided prior to the D.C. Circuit court's ruling in Paramax Systems. In contrast to this case, the Bloom court found that the union security clause in Bloom had been "unlawfully interpreted and applied" in the context of an unfair labor practice allegation questioning the approval of a settlement between the union and the employer.

[5] As noted above, the union security provision contained a provision stating that it would not apply

> until on or after the thirtieth day following the beginning of . . . employment . . . and the Producers shall interpret this sentence to mean that membership in the Union cannot be required of any

Although Marquez characterizes this claim as a breach of the duty of fair representation, it is actually a claim that the union security clause 30-day provision violates § 8(a)(3) of the NLRA. The Supreme Court has held that "[i]t is essential to the administration of the [National Labor Relations] Act that these determinations (of what activities are protected by § 7, or constitute unfair labor practices under § 8 of the NLRA) be left in the first instance to the National Labor Relations Board." San Diego Building Trades Council v. Garmon, 359 U.S. 236, 244-45 (1959). "[W]hen an activity is arguably subject to § 7 or § 8 of the [NLRA], the States as well as the federal courts must defer to the exclusive competence of the [Board] if the danger of state interference is to be averted." Id. at 245.

Because Marquez's claim actually alleges a violation of § 8(a)(3), and therefore is actually an unfair labor practice claim, it is preempted by the exclusive jurisdiction of the National Labor Relations Board. As the Supreme Court has stated, it "is the conduct being regulated, not the formal description of governing legal standards, that is the focus of concern." Motor Coach Employees v. Lockridge, 403 U.S. 274, 292 (1971). The court will not exercise jurisdiction over Marquez's claim about the 30-day grace period as this claim is subject to the exclusive jurisdiction of the National Labor Relations Board. Therefore, SAG is entitled to summary judgment on this claim as well.

C. Marquez's Breach of the CBA Claims

In addition to her duty of fair representation claims, Marquez alleges that SAG and Lakeside breached the CBA by applying the union security provision to her. The court finds that Marquez's

---

performer by a Producer as a condition of employment until thirty (30) days after his first employment as a performer in the motion picture industry; . . .

Subpart B, CBA.

breach of contract claims must be dismissed for two reasons. First, this claim asserts that the CBA is violative of the NLRA because it allegedly imposes obligations upon employees in excess of that which may be required under the NLRA. Again, Marquez is couching her § 8(a)(3) violation allegations in other terms, but this will not save the claim from preemption.

Second, Marquez has utterly failed to exhaust her contract remedies. See Republic Steel Corp. v. Maddox, 379 U.S. 650, 652 (1965) ("As a general rule in cases to which federal law applies, federal labor policy requires that individual employees wishing to assert contract grievances must *attempt* use of the contract grievance procedure agreed upon by the employer and union as the mode of redress.") (footnote omitted). Marquez did not file a grievance with either SAG or Lakeside. In addition, she never requested that SAG pursue a grievance on her behalf, or that SAG investigate whether a grievance should be filed. Finally, Marquez does not dispute that she never complained to SAG directly, failing even to send the September 6, 1994 letter to SAG. With respect to all but Marquez's requests for injunctive relief, the grievance resolution procedure in the CBA should have been exhausted prior to bringing the breach of contract claims. Additionally, Marquez failed to "afford the union the opportunity to act on [her] behalf," id., by requesting investigation into the propriety of filing a grievance. She will therefore not be permitted to claim a contractual violation at this point. Finally, the court rejects Marquez's assertions that her last-minute letter sent only to Lakeside excuses her obligations to exhaust contractual remedies. Therefore, SAG and Lakeside are entitled to summary judgment on Marquez's breach of contract claims.

D. Marquez's Motion to Reopen Discovery

Marquez has requested leave to reopen discovery to depose a SAG Station 12 clerk. The discovery deadline in this matter was December 18, 1995. On December 13, 1995, plaintiff's

counsel was made aware of the name of the Station 12 clerk, Sam McFarland, who Marquez now wishes to depose.[6] Marquez did not seek permission to reopen discovery until March 12, 1996. The court hereby DENIES Marquez's untimely request to reopen discovery in this matter.

III. CONCLUSION

Based on the foregoing, the court finds and rules that defendants' motions for summary judgment are GRANTED and plaintiff's motion for summary judgment is DENIED, as follows:

1) The court GRANTS defendant SAG's motion for summary judgment with respect to Marquez's first cause of action claiming a breach of the duty of fair representation by entering into and maintaining the CBA with Lakeside;

2) The court GRANTS defendant SAG's motion for summary judgment with respect to Marquez's first cause of action claiming a breach of the duty of fair representation by SAG's application of the 30-day grace period provision, finding this claim subject to the exclusive jurisdiction of the National Labor Relations Board;

3) The court GRANTS defendant SAG and defendant Lakeside's motions for summary judgment with respect to Marquez's second cause of action claiming a breach of the CBA, finding this claim subject to the exclusive jurisdiction of the National Labor Relations Board and additionally finding that Marquez failed to exhaust her administrative remedies.

---

[6] Defendants note that plaintiff was made aware of McFarland's name as early as October 24, 1995 when the parties jointly identified Deposition Exhibit 5.

4) Plaintiff's request to reopen discovery in this matter is DENIED.

DATED at Seattle, Washington this 16th day of April, 1996.

/s/
BARBARA JACOBS ROTHSTEIN
UNITED STATES DISTRICT JUDGE

APPENDIX C

NATIONAL LABOR RELATIONS ACT,
§§ 8(a)(3) and 8(b)(2),
29 U.S.C. §§ 158(a)(3), and 158(b)(2)

NATIONAL LABOR RELATIONS ACT,
§§ 8(a)(3) and 8(b)(2),
29 U.S.C. §§ 158(a)(3), and 158(b)(2)

§ 158. Unfair labor practices

(a) Unfair labor practices for an employer

It shall be an unfair labor practice for an employer—

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made . . . : *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(b) Unfair labor practices by labor organization

It shall be an unfair labor practice for a labor organization or its agents—

(2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) of this section . . . .

Supreme Court, U.S.
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(2)

No. 97-1056

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NAOMI MARQUEZ,
Petitioner,
v.
SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MEMORANDUM FOR THE SCREEN ACTORS GUILD IN RESPONSE TO THE CERTIORARI PETITION

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MEMORANDUM FOR THE SCREEN ACTORS GUILD IN RESPONSE TO THE CERTIORARI PETITION

STATEMENT

The Screen Actors Guild, Inc. ("SAG") is a labor organization representing performers in the motion picture and television industry. Pet. App. 23a. In July 1994, Lakeside Productions, Inc., producer of the television show "Medicine Ball," became a signatory to the 1992 Memorandum of Agreement between SAG and the Independent Motion Picture and Television Producers. *Id.* 22a-23a. As a result of signing the Memorandum of Agreement, Lakeside became bound by a number of SAG agreements, including the SAG Codified Basic Agreement of 1989 for Independent Producers. *Id.* 23a.

The 1989 Basic Agreement contained the following "Union Security Provision":

> A. Every performer hereafter employed by any Producer, whether by contract or otherwise, or who acts before the camera, or who makes sound track within the Union's jurisdiction, for any Producer, shall be a member of the Union in good standing.
>
> B. The foregoing subsection A., requiring as a condition of employment membership in the Union, shall not apply until on or after the thirtieth day following the beginning of such employment or the effective date of this Agreement whichever is the later; the Union and the Producers shall interpret this sentence to mean that membership in the Union cannot be required of any performer by a Producer as a condition of employment until thirty (30) days after his first employment as a performer in the motion picture industry; "first employment" meaning the first employment as a performer in the motion picture industry on or after August 10, 1948. . . . The Producer shall not be held to have violated this paragraph if it employs a performer who is not a member of the Union in good standing, if the Producer has reasonable grounds for believing that membership in the Union was not available to such per-

former on the same terms and conditions generally applicable to other members, or if the Producer has reasonable grounds for believing that membership in the Union was denied to such performer or such performer's membership was terminated for reasons other than the failure of the performer to tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union; provided, however, the Producer shall not be deemed to have such reasonable grounds for believing until he has made inquiry of the Union as to the facts.

* * * *

F. The interpretation contained in the first sentence of subsection B. of this Section 2 has been approved by an advisory opinion of the General Counsel of the National Labor Relations Board. If such approval of such sentence is changed by a ruling of such General Counsel, then the new ruling of such General Counsel shall prevail, until the same is overruled by the Board or a court of competent jurisdiction. If the Board or a court of competent jurisdiction shall change said ruling in a proceeding in which the Union is a party, then the new ruling or opinion shall prevail, until the same is reversed by a court of competent jurisdiction. [9th Cir. Excerpts of Record Dk. No. 39.] [1]

On August 31, 1994, Lakeside offered Naomi Marquez a one-line role in a "Medicine Ball" episode to be filmed on September 8. Pet. App. 23a. Ms. Marquez had previously been employed for over one month as a performer in a motion picture covered by a SAG collective bargaining agreement. *Id.* 24a. Consequently, SAG informed Lakeside's casting agent that Ms. Marquez was obliged to comply with the Union Security Provision as a condition of performing in "Medicine Ball." *Id.* In the week between Lakeside's offer to Ms. Marquez and the filming of the part she was offered, Ms. Marquez, her agents and attorneys, Lakeside's agents, and SAG and its attorney engaged in a series of telephone calls and written correspondence concerning how Ms. Marquez might meet the conditions of the Union Security Provision. *Id.* 23a-26a. The upshot was that as of September 7, Ms. Marquez had not made arrangements to make the appropriate payment to SAG under the Union Security Provision, and Lakeside offered the part to another performer. *Id.* 4a.

[1] During the pendency of this case, SAG and the Alliance of Motion Picture and Television Producers (of which Lakeside is a member) modified subsection A of the Union Security Provision by adding the following sentence:

> As defined and applied in this section, the term "member of the Union in good standing" means a person who offers to pay (and if the Union accepts the offer, pays) union initiation fees and dues and financial obligations in accordance with the requirements of the National Labor Relations Act. [Pet. App. 6a n.2.]

Ms. Marquez brought suit alleging that SAG had breached its duty of fair representation by: (1) maintaining a union security clause that speaks in terms of "membership in good standing" being a requirement for employment; (2) failing to inform her of her rights with respect to the enforcement of that clause; and (3) violating her right to a thirty-day grace period under § 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(3). Pet. App. 4a. Ms. Marquez also alleged that SAG and Lakeside had breached implied terms of the collective bargaining agreements. *Id.*

Ruling on cross-motions for summary judgment, the district court (Rothstein, J.) dismissed Ms. Marquez's complaint in its entirety. Pet. App. 33a. The district court concluded that the Union Security Provision was neither facially invalid nor improperly enforced. *Id.* 28a-30a. The court also ruled that the claimed violations of NLRA § 8(a)(3) were within the exclusive jurisdiction of the National Labor Relations Board ("NLRB"). *Id.* 30a-32a.

On appeal, the Ninth Circuit affirmed the dismissal of Ms. Marquez's challenge to the facial legality of the Union Security Provision and the dismissal of her breach of contract claims. Pet. App. 6a-10a & 19a-21a. The

court of appeals also affirmed the dismissal of Ms. Marquez's grace period claim. *Id.* 10a-13a. At the same time, the court of appeals reversed the district court's summary judgment dismissing Ms. Marquez's claim that SAG had breached its duty of fair representation by failing to accurately inform her of the conditions imposed by the Union Security Provision. In this regard, the court of appeals found that there were material disputes of fact over what SAG representatives said to Ms. Marquez, to her agents and to Lakewood's agents and that the district court had failed to consider Ms. Marquez's claim that SAG had acted arbitrarily in its enforcement of the Provision. *Id.* 13a-19a. The court of appeals then remanded the case to the district court for resolution of these matters. *Id.* 19a.

ARGUMENT

The respondent Screen Actors Guild submits as follows with regard to the three questions raised by the *certiorari* petition:

(a) that the petition's first question—having to do with the validity of union security clauses phrased in terms of "membership"—is identical to the question raised by the earlier filed *certiorari* petition in *Paperworkers, et al. v. Buzenius & NLRB*, No. 97-945, and that the first question here should be disposed of in a manner consistent with the Court's disposition of the *Paperworkers v. Buzenius certiorari* petition;

(b) that the petition's second question—having to do with the scope of the exclusive primary jurisdiction of the National Labor Relations Board—is insubstantial and does not warrant this Court's review; and

(c) that the petition's third question—having to do with an employer's "indispensable party" status in a suit challenging the facial validity of a collective bargaining agreement to which the employer is a party—is likewise insubstantial since the dismissal by the courts below of Ms. Marquez's challenge to the facial validity of the agreement for want of legal merit formed the predicate for dismissing the employer as a party.

I. THE FACIAL VALIDITY OF STANDARD FORM "MEMBERSHIP" UNION SECURITY CLAUSES.

The first question presented here is identical to the question presented by the *certiorari* petition in *Paperworkers v. Buzenius*. Indeed, the *Paperworkers certiorari* petition cites the decision below here as being in conflict with the decision below there, and the instant *certiorari* petition relies upon the same conflict.

A. In *Paperworkers v. Buzenius*, the Sixth Circuit had held that "a union security clause that requires 'membership in good standing,' without concurrent definition of that term" is facially invalid. *Buzenius v. NLRB*, 124 F.3d 788, 791 (6th Cir. 1997), *pet. for cert. pending sub nom., Paperworkers v. Buzenius*, No. 97-945.

In this case, the court of appeals addressed the question of whether SAG breached its duty of fair representation by "enter[ing] into a collective bargaining agreement ('CBA') with a union security term which provides: 'Every performer hereafter employed by any Producer . . . shall be a member of the Union in good standing.'" Pet. App. 6a. In that regard, "Marquez contend[ed] that the union acted arbitrarily and in bad faith in negotiating this term because unions may not legally require full union membership as a condition of employment." *Id.* Rejecting this contention, the court of appeals "affirm[ed] the district court's conclusion that SAG did not breach its duty of fair representation by negotiating a CBA which requires covered actors to be members of the union in good standing." *Id.* 10a.

Judge O'Scannlain's analysis of this issue began with the observation that "[t]he NLRA by its very terms allows the inclusion of a union security term requiring union 'membership.'" Pet. App. 6a. "At the same time," Judge O'Scannlain continued, "the concept of 'membership' in CBAs has become a term of art: unions can require no more than payment of initiation fees and dues covering a 'financial core' of services provided to all employees." *Id.* 6a-7a. But given the National Labor Relation Act § 8(a)(3)'s terms, the court of appeals held that unions

and employers are *not* required "to re-phrase their CBA's to reflect this 'financial core' limitation on the concept of 'membership,'" noting that "[t]wo of our sister Circuits have recently . . . held that terms requiring union 'membership' continue to be permissible under federal law." *Id.* 8a, citing *I.U.E. v. NLRB*, 41 F.3d 1532 (D.C. Cir. 1994), and *Nielsen v. International Ass'n of Machinists*, 94 F.3d 1107, 1113-15 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 1426 (1997).

It is very much to the point that, having sustained the district court's ruling with respect to the facial validity of the Union Security Provision, the court of appeals remanded the case for the district court to "consider[] Marquez's allegations that SAG's failure to notify all employees of their right to pay the lesser 'core' fees under [*Communications Workers v.*] *Beck*[, 487 U.S. 735 (1988),] violates the duty of fair representation." Pet. App. 16a. Expressing the opinion that "this duty may well include a requirement to inform workers of the minimal requirements with respect to the payment of only 'core' dues and fees," *id.* 17a, Judge O'Scannlain observed that "[t]hose Circuits which have upheld the facial validity of union security clauses have suggested that, because a CBA's membership requirement may be misleading, the unions have a duty to inform workers of the 'core' payment option," *id.* 16a.[2]

As the court of appeals' opinion notes, Pet. App. 8a, the Eighth Circuit's decision in *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994), is contrary to the decision below and to the decisions of the District of Columbia and Seventh Circuits followed in the decision below. And, as

[2] In remanding this question, the court of appeals noted that there was conflicting evidence as to "whether SAG representatives impermissibly asserted that Marquez was required to 'join' the union before she would be eligible to work or whether the term used was must 'pay' the union," Pet. App. 14a, and as to "SAG['s] claim[] that it has an adequate system for 'notifying all nonmember employees who make payments pursuant to its union security clause of their right to object and pay only the collective bargaining portion of the agency fee,'" *id.* 17a.

the *certiorari* petition adds, Pet. 9-10, the Sixth Circuit's decision in *Paperworkers v. Buzenius*, which was issued just ten days after the decision below, is also contrary to the decisions of the District of Columbia, Seventh and Ninth Circuits.

B. Given the foregoing, we cannot dispute the *certiorari* petition's assertion that the first question presented here and the question presented in *Paperworkers v. Buzenius* is a question that has generated a deep conflict among the circuits. Nor can we dispute the proposition that the issue of the facial validity of standard form "membership" union security clauses is an important recurring federal labor law issue.

All that being so, the first question presented here should, we believe, be disposed of in conformity with the disposition of the earlier filed *Paperworkers v. Buzenius certiorari* petition. If the *Paperworkers* petition is granted, the first question presented by the petition here should, consistent with the Court's normal practice, be held pending the decision on the merits there. And, if review of the *Paperworkers* petition is denied, review of the first question presented here should likewise be denied.

To be sure, Ms. Marquez asserts that the instant case "more concretely presents" the question common to the *Paperworkers v. Buzenius certiorari* petition and the instant *certiorari* petition, "because the provision involved here requires every performer *both* 'to be "a member of the Union in good standing" *and* to pay periodic dues and initiation fees,' (App. at 2a (emphasis added))," while "[t]he compulsory unionism provision in *Buzenius* only says that employees " 'shall become and remain members of the Union in good standing' " and 'does not define "member in good standing." ' 124 F.3d at 789." Pet. 14-15.

But to make this point, Ms. Marquez distorts beyond recognition the union security clause at issue here—which does *not* in terms "require[] every performer *both* 'to be "a member of the Union in good standing" *and* to pay periodic dues and initiation fees,' (App. at 2a (emphasis

added))," Pet. 15, or " 'define "member in good standing," ' " *id.* 14.[3] Not surprisingly then, the courts below focused exclusively on the portion of the Union Security Provision that requires "[e]very performer hereafter employed by any Producer . . . shall be a member of the Union in good standing." Pet. App. 6a. And, in this respect, the clause here is identical to the clause considered by the Sixth Circuit in *Paperworkers v. Buzenius*. *See* 124 F.3d at 789 ("all employees . . . shall become and remain members of the Union in good standing as a condition of employment").

The Union Security Provision in this case is, of course, *much* more detailed than the clause at issue in *Paperworkers v. Buzenius*. But, in that regard, the clause here is *sui generis*. By contrast, the "membership" union security clause at issue in *Paperworkers v. Buzenius*, which was based on a model prescribed by the NLRB, is a standard form "membership" clause. *Compare Buzenius*, 124 F.3d at 789, *with Keystone Coat, Apron & Towel Supply Co.*, 121 NLRB 880, 884 (1958). Thus, contrary to Ms. Marquez's assertion, the uniqueness of the union security clause here, together with the interlocutory nature of the decision below, makes this case, if anything, a less appropriate vehicle than *Paperworkers v. Buzenius* for resolving the issue dividing the circuits.

II. JURISDICTION OVER THE CLAIM THAT MS. MARQUEZ WAS DENIED A THIRTY-DAY GRACE PERIOD IN VIOLATION OF SECTION 8(a)(3) OF THE NATIONAL LABOR RELATIONS ACT.

Relying exclusively on decisions of the National Labor Relations Board construing the first proviso to NLRA § 8(a)(3), Ms. Marquez claims that she should have been allowed a new thirty-day grace period from paying union dues after being hired by Lakeside. Pet. 15-16.

[3] As we explain in note 1, *supra*, the clause here was amended during the course of this litigation to add a definition of the term "member of the Union in good standing," but that definition was not contained in the clause that covered Ms. Marquez and was not considered by the courts below.

Given the basis of this claim, the courts below "held this claim is preempted by the NLRA because it is nothing other than an unfair labor practices claim, depending entirely on the question of the proper interpretation of § 8(a)(3) [, and] [i]t is therefore within the primary jurisdiction of the NLRB." Pet. App. 11a, citing *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 244 (1959). As Judge O'Scannlain correctly observed, "the *Beck* court specifically warned federal courts not to be hoodwinked by a plaintiff's attempt to side-step the exclusive jurisdiction of the NLRB over unfair labor practices claims in this manner." Pet. App. 12a, citing *Communications Workers v. Beck*, 487 U.S. at 743.

The law as stated by the decision below is so firmly established that Ms. Marquez is unable to cite a single decision supporting her assertion that a district court has jurisdiction over a claim resting solely on an alleged violation of NLRA § 8(a)(3), and we know of no such decision. *Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986 (7th Cir. 1997), invoked at pp. 17-19 of the *certiorari* petition, in fact, considered and dismissed as moot the entirely distinct legal question presented as the first question in the instant *certiorari* petition—the facial validity of union security clauses that speak in terms of a "membership" requirement—and only that question. Indeed, the *Wegscheid* opinion states that a "district court would *not* have jurisdiction over a claimed violation of section 8(a)(3) that [i]s not co-joined with a claimed violation of the union's duty of fair representation, or some other basis of federal jurisdiction. . . ." 117 F.3d at 989 (emphasis added).

This is, moreover, the last issue on which to make an exception to the *Garmon* rule. The NLRB law with respect to the application of § 8(a)(3)'s grace-period requirements has more than its share of complexities and subleties. *Compare, e.g., New York State Electric & Gas Corp.*, 135 NLRB 357 (1962) (clause requiring membership "within thirty days" lawful), *with Chun King Sales, Inc.*, 126 NLRB 851 (1960) (clause requiring membership

"within thirty days" *un*lawful). As the court below noted, Ms. Marquez's thirty-day grace period "claim rests squarely upon the proper interpretation of § 8(a)(3)," and "[t]he factually complex question of how properly to apply § 8(a)(3)'s requirements to hiring practices in the motion picture industry is precisely the kind of question that . . . the NLRB was designed to address." Pet. App. 13a.[4]

CONCLUSION

With respect to the first question presented, the Court should hold the petition and dispose of it consistent with the disposition in *Paperworkers v. Buzenius*, No. 97-945. With respect to the second and third questions presented, the petition should be denied.

Respectfully submitted,

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[4] The third question presented by the *certiori* petition challenges the court of appeals' "holding that Lakeside is not 'a necessary party to obtain full relief through contract reformation, *as the facial challenge to the CBA does not survive*.' (App. at 20a [emphasis added])," on the ground that "Lakeside is an indispensable party for the relief that would be appropriate should Ms. Marquez prevail on either of the first two questions presented. . . ." Pet. 20 (emphasis added).

As the court of appeals' opinion shows, the question of Lakeside's "indispensable party" status was treated not as an independent jurisdictional question of some moment but rather as one that is entirely derivative of the merits of Ms. Marquez's challenge to the facial validity of the agreement. Thus, the lower courts' dismissal of Lakeside was predicated solely on the fact that those courts had dismissed Ms. Marquez's claims challenging the facial validity of the collective bargaining agreement as being without legal merit. Pet. App. 20a.

That ruling does not present an "indispensable party" question that is worthy of this Court's review.

Supreme Court, U.S.
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No. 97-1056

IN THE
Supreme Court of the United States

OCTOBER TERM, 1997

NAOMI MARQUEZ,

Petitioner,

v.

SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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February 23, 1998

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ARGUMENT

I. The Court Should Grant Certiorari in This Case, Because Conflict Among the Courts of Appeals Concerning the Facial Validity of Agreements That Purport to Require Payment of Full Union Dues Could Continue If Certiorari Is Granted Only in *Buzenius*.

The first question the Petition of Naomi Marquez ("Ms. Marquez") for a Writ of Certiorari presents is whether section 8(a)(3) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(3) (1988), and the statutory duty of fair representation permit compulsory unionism agreements that misleadingly purport to require "membership" and payment of full union dues as a condition of employment, although section 8(a)(3), as definitively interpreted by this Court, prohibits enforcement of those requirements. (*See* Pet. at i, ¶ I, 8-15.)

Respondent Screen Actors Guild ("SAG") agrees that this question "is identical to the question presented by the *certiorari* petition in *Paperworkers v. Buzenius*," 66 U.S.L.W. 3427 (U.S. docketed Dec. 8, 1997) (No. 97-945). (SAG's Mem. at 5.) SAG concedes that this "is a question that has generated a deep conflict among the circuits." SAG also admits "that the issue of the facial validity of standard form 'membership' union security clauses is an important recurring federal labor law issue." (*Id.* at 7.)

However, SAG argues that in this case this question should merely "be disposed of in conformity with the disposition of the earlier filed . . . *Buzenius* . . . petition," rather than be considered by the Court on its merits. SAG contends that, for three reasons, this case is "a less appropriate vehicle than . . . *Buzenius* for resolving the issue dividing the circuits." (*Id.* at 7-8.) None of the reasons SAG gives justifies not granting this Petition, either alone or together with the petition in *Buzenius*.

First, SAG asserts that this case does not more completely present the question it has in common with *Buzenius*, because, SAG says, the compulsory unionism clause here "does *not* in terms require[] every performer *both* to be 'a member of the

Union in good standing' *and* to pay periodic dues and initiation fees, or define 'member in good standing.'" (*Id.* at 7-8 (quoting Pet. at 14-15) (citations and internal quotation marks omitted) (alteration in original).) This assertion is a disingenuous quibble.

In *Buzenius*, the compulsory unionism provision only says that employees "'shall become and remain members of the Union in good standing as a condition of employment.'" As the Sixth Circuit noted, that provision "does not define 'member in good standing.'" *Buzenius v. NLRB*, 124 F.3d 788, 789 (6th Cir. 1997), *petition for cert. docketed*, 66 U.S.L.W. 3427 (U.S. Dec. 8, 1997) (No. 97-945). Thus, *Buzenius* does not necessarily present the question of whether a compulsory unionism provision is facially invalid if it defines "membership" as the payment of full union dues and initiation fees and does not explain that the maximum obligation under *Communications Workers v. Beck*, 487 U.S. 735 (1988), is payment of that part of dues related to collective bargaining and contract administration.

This case does necessarily present the question in that form. To "define" means "to fix or mark the limits of" something. *Webster's New Collegiate Dictionary* 297 (1977). In addition to stating that every performer must be "a member of the Union in good standing," the agreement here says that the

> Producer shall not be held to have violated this paragraph if it employs a performer who is not a member of the Union in good standing, . . . if the Producer has reasonable grounds for believing that membership in the Union was denied . . . or . . . terminated for reasons other than the failure of the performer to tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union . . . .

(Walker Dep., Ex. 7 at 6 (filed Dec. 28, 1995).)

Thus, as SAG said in its brief in the court of appeals, "the clause here does . . . recite"—*i.e.*, define—"the full set of limitations on the enforcement of [the membership] obligation stated in NLRA § 8(a)(3)," (Appellee's Br. at 22), but not the

additional limitation recognized in *Beck*. (*See also* Pet'rs' Reply Br. at 9, *Buzenius*) ("the *Marquez* clause . . . puts a gloss on the term 'membership in good standing'").[1] Therefore, if the Court grants the Petition in this case, it must necessarily decide a question that it could avoid in *Buzenius*: whether employees' *Beck* rights must be mentioned in the compulsory unionism provision.

Second, SAG argues that the compulsory unionism "clause here is *sui generis*," while that in *Buzenius* "is a standard form 'membership' clause." (SAG's Mem. at 8.) This argument also is disingenuous, because in the court of appeals SAG referred to its clause as "a ***standard*** union shop clause." (Appellee's Br. at 22 (emphasis added).)

Reported decisions of lower courts on this issue show that SAG's clause is similar to many others in defining "membership" as the payment of full dues. For example, in *Wegscheid v. Auto Workers Local 2911*, as here, the compulsory unionism clause was "a close paraphrase of the language . . . from section 8(a)(3) of the" NLRA. 117 F.3d 986, 988 (7th Cir. 1997). And, in *Schreier v. Beverly California Corp.*, which involved yet a third union, the compulsory unionism provision also defined membership "in good standing" as the payment of full union dues and initiation fees. 892 F. Supp. 225, 226 (D. Minn. 1995). Thus, the question presented more concretely here than in *Buzenius* is one that is likely to arise again and again unless the Court settles it now in this case.

Third, SAG contends that "the interlocutory nature of the decision below[] makes this case . . . a less appropriate vehicle than . . . *Buzenius* for resolving the issue dividing the circuits." (SAG's Mem. at 8.) However, this Court may exercise its jurisdiction under 28 U.S.C. § 1254(1) (West 1993) over a court of appeals' interlocutory decision where, as here, there is a conflict among the federal courts of appeals over a fundamental

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[1] One of the attorneys for SAG, Laurence Gold, is counsel of record for the union in *Buzenius*.

question. *See, e.g., United States v. General Motors Corp.*, 323 U.S. 373, 374-77 (1945); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403, 408-09 (1916).

Moreover, the court of appeals' remand will not affect the questions presented by this Petition, because the issues remanded concern only the enforcement of the compulsory unionism provision, not its facial validity. *(See* Pet. App. at 19a, 21a.) Thus, the questions presented here are precisely the same as they would be on a second appeal and petition for certiorari after a final judgment on remand. As to these questions, the court of appeals' decision is effectively final, because the issues "will survive and require decision regardless of the outcome of future . . . proceedings" in the lower courts. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 480 (1975).

On the other hand, because the remanded issues are fact bound, the proceedings on remand are unlikely to raise additional questions that might require review by this Court on a second appeal. Therefore, "immediate rather than delayed review would be the best way to avoid 'the mischief of economic waste and of delayed justice,'" as well as to end the conflict among the courts of appeals that might continue if certiorari is granted only in *Buzenius* (and that will certainly continue if certiorari is denied in both cases). *See Cox Broadcasting*, 420 U.S. at 477-78 (quoting *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945)).

II. SAG Does Not Explain Why the Duty of Fair Representation Is Breached, and the Federal Courts Have Jurisdiction, If a Union Misrepresents the *Extent* of an Employee's Obligations Under Section 8(a)(3), But Not If It Misrepresents *When* Those Obligations Apply.

The second question this Petition presents is whether the National Labor Relations Board ("NLRB") has exclusive jurisdiction over a claim that a union breached the duty of fair representation by negotiating a compulsory unionism provision that misleadingly informs performers who have been employed in the entertainment industry for more than thirty days that they must be union members before they begin any future employment. (*See* Pet. at i, ¶ II, 15-19.)[2] SAG argues that this claim is clearly within the NLRB's exclusive jurisdiction because it is "a claim resting solely on an alleged violation of NLRA § 8(a)(3)." (SAG's Mem. at 9.)

However, SAG does not argue that the NLRB has exclusive jurisdiction over a claim that a union breached the duty of fair representation by negotiating a compulsory unionism provision that misleadingly informs employees that they must be members and pay full union dues. Such an argument is foreclosed by this Court's decision in *Beck*, which held that the latter claim is ***not*** within the NLRB's exclusive jurisdiction, even though that claim also rests "solely" on an alleged violation of section 8(a)(3), *i.e.*, the attempted imposition of obligations not permitted by section 8(a)(3). *See* 487 U.S. at 742-44.

In *Wegscheid*, the Seventh Circuit explicitly ruled, based on *Beck*, that "an alleged violation of section 8(a)(3) is litigable in a district court suit challenging [misleading] statements" that "happen to be contained in the collective bargaining agreement, since the union's duty of fair representation can be violated by union conduct in the negotiation of a collective bargaining agreement, as well as in the enforcement of it." 117 F.3d at 989 (citations omitted). SAG asserts that, nonetheless, *Wegscheid* does not support court jurisdiction here, because *Wegscheid* considered only "the entirely distinct legal question" of "the facial validity of union security clauses that speak in terms of a 'membership' requirement." (SAG's Mem. at 9.)

However, SAG does not explain how the question of the facial validity of a compulsory unionism clause that misleadingly speaks in terms of a membership requirement that violates section 8(a)(3) is "entirely distinct" from the question of the facial validity of a clause that misleadingly speaks in terms of a thirty-day employment-in-the-industry requirement that also violates section 8(a)(3). Logically, there is no distinction. Thus,

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[2] This question also includes whether, if the Board's jurisdiction is not exclusive, the breach occurred here. (Pet. at i, ¶ II.)

on this second question there is a direct conflict, that this Court should resolve, between the Seventh Circuit's decision in *Wegscheid* and the Ninth Circuit's in this case.

SAG also relies on the Ninth Circuit's observation that "[t]he factually complex question of how properly to apply § 8(a)(3)'s requirements to hiring practices in the motion picture industry is precisely the kind of question that . . . the NLRB was designed to address." (Pet. App. at 13a, *quoted in* SAG's Mem. at 10.) However, this is not a factually complex issue. It is a simple question of statutory interpretation. *See Theatrical Stage Employees Local 644*, 259 N.L.R.B. 1415, 1416, 1422 (1982).

Congress has specified exceptions to section 8(a)(3)'s requirement that employees have a thirty-day "grace period" with every employment relationship where ***Congress*** has found that hiring practices in a particular industry justify an exception. *See* 29 U.S.C. § 158(f) (1988). Congress has made no exception for the entertainment industry.

Thus, hiring practices in the motion picture industry are irrelevant in applying the thirty-day "grace period" requirement, as the NLRB itself recognized in *Theatrical Stage Employees Local 644*, 259 N.L.R.B. at 1422. Moreover, there also are no exceptions to the rule that NLRB preemption "does not extend to suits alleging a breach of the duty of fair representation," regardless of "the subject matter of the fair representation claim presented, the relative expertise of the NLRB in the particular area of labor law involved, or any other factor." *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 74-76 (1989).

III. Neither the Employer Nor SAG Disputes That the Question of the Court of Appeals' Dismissal of the Employer Should Be Reviewed If the Court Grants Certiorari on Either of the Other Questions Presented.

The third question this Petition presents is whether the employer, Respondent Lakeside Productions, Inc. ("Lakeside"), is an indispensable party to this suit, and should not have been dismissed, because the remedy for both alleged facial defects in the collective-bargaining agreement is reformation or expunge-

ment. (*See* Pet. at i, ¶ III, 19-20.) Lakeside has not opposed the grant of certiorari. SAG argues that this third question is not worthy of this Court's review, because it is a question "that is entirely derivative of the merits of Ms. Marquez's challenge to the facial validity of the agreement." (SAG's Mem. at 10 n.4.)

This question is indeed derivative of the merits of the first two questions presented. As such, it probably falls within the rule that the "statement of any question presented is deemed to comprise every subsidiary question fairly included therein." Sup. Ct. R. 14.1(a). Out of an abundance of caution, this issue is stated as a separate question in the Petition.

SAG does not dispute that the Ninth Circuit's holding that Lakeside is not a necessary party for full relief directly conflicts with the contrary holding of the Seventh Circuit in *Wegscheid*, 117 F.3d at 988. The Court should grant certiorari on this question as well if, and only if, it grants certiorari on either or both of the first two questions presented.

CONCLUSION

The Court should grant this Petition on all questions presented, and, if a writ also is issued in *Buzenius*, set the cases for argument consecutively or consolidate and hear them together.

Respectfully submitted,

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February 23, 1998

Supreme Court, U.S.
FILED
MAY 7 1998
CLERK

(4)

No. 97-1056

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

NAOMI MARQUEZ,

Petitioner,

v.

SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit**

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED DECEMBER 24, 1997
CERTIORARI GRANTED MARCH 23, 1998

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U.S. District Court
U.S. District Court—Western Washington (Seattle)

CIVIL DOCKET FOR CASE #: 94-CV-1831

Marquez v. Screen Actors Guild, et al

Filed: 12/12/94

* * * *

RELEVANT DOCKET ENTRIES

DATE		PROCEEDINGS
12/12/94	1	COMPLAINT FOR DECLARATORY INJUNCTIVE RELIEF & DAMAGES (Summons(es) issued) Receipt # 220553 (cas) [Entry date 12/14/94]
2/13/95	10	ANSWER to complaint [1-1] by defendant Screen Actors Guild (cas) [Entry date 02/16/95]
2/24/95	12	ANSWER to complaint [1-1] by defendant Lakeside Productions (cas) [Entry date 03/06/95]
12/28/95	39	MOTION by plaintiff Naomi Marquez for summary judgment OA REQUESTED noted for 1/19/96 (mg) [Entry date 12/29/95]
12/28/95	40	MEMORANDUM by plaintiff in support of motion for summary judgment [39-1] (mg) [Entry date 12/29/95]

DATE		PROCEEDINGS
12/28/95	41	DECLARATION of Naomi Marquez in support of motion for summary judgment [39-1] (mg) [Entry date 12/29/95]
12/28/95	43	MOTION by defendant Screen Actors Guild for summary judgment noted for 1/19/96 (mg) [Entry date 12/29/95] [Edit date 12/29/95]
12/28/95	44	MEMORANDUM by defendant in support of motion for summary judgment [43-1] (mg) [Entry date 12/29/95] [Edit date 12/29/95]
12/28/95	45	RECORD by defendants in support of motion for summary judgment [43-1] (mg) [Entry date 12/29/95]
12/28/95	47	NOTICE OF JOINDER by defendant Lakeside Productions joining motion for summary judgment [43-1] (mg) [Entry date 12/29/95]
1/12/96	49	RESPONSE (BRIEF OPPOSING) by plaintiff Naomi Marquez to defendants' motion for summary judgment [43-1] (mg) [Entry date 01/16/96]
1/12/96	50	SUPPLEMENTAL RECORD by plaintiff Naomi Marquez in support of motion response [49-1] (mg) [Entry date 01/16/96]
1/12/96	51	DECLARATION of Raymond J. LaJeunesse Jr. in opposition to dfts' motion for summary judgment re: motion response [49-1] (mg) [Entry date 01/16/96]

DATE		PROCEEDINGS
1/12/96	53	RESPONSE (MEMORANDUM IN OPPOSITION) by defendant Lakeside Productions to motion for summary judgment [39-1] (mg) [Entry date 01/16/96]
1/16/96	54	RESPONSE (OPPOSITION) by defendant Screen Actors Guild to plaintiff's motion for summary judgment [39-1] (mg) [Entry date 01/18/96]
1/16/96	55	DECLARATION of Leonard Chassman in support of opposition to motion for sj re: motion response [54-1] (mg) [Entry date 01/18/96]
1/18/96	56	REPLY MEMORANDUM by defendant Lakeside Productions in support of defendants' motion for summary judgment [43-1] (mg) [Entry date 01/19/96]
1/18/96	57	REPLY BRIEF by defendant Screen Actors Guild in support of defendants' motion for summary judgment [43-1] (mg) [Entry date 01/19/96]
1/18/96	58	SUPPLEMENTAL RECORD by defendant Screen Actors Guild in support of dft's reply re: motion reply [57-1]; and, DECLARATION OF NATHAN J. KOWALSKI (mg) [Entry date 01/19/96]
1/18/96	59	REPLY by plaintiff Naomi Marquez in support of plaintiff's motion for summary judgment OA REQUESTED [39-1] (mg) [Entry date 01/19/96]

DATE		PROCEEDINGS
2/21/96	68	SUPPLEMENT TO RECORD by defendant Screen Actors Guild, defendant Lakeside Productions in support of dfts' motion for summary judgment and in opposition to plaintiff's motion for summary judgment (mg) [Entry date 02/23/96]
2/28/96	69	RESPONSE by plaintiff Naomi Marquez re: dfts' supplement to record [68-1] (mg) [Entry date 02/29/96]
2/29/96	71	CORRECTED SUPPLEMENT TO RECORD by defendant Screen Actors Guild, defendant Lakeside Productions re supplement [68-1] (mg) [Entry date 03/01/96]
4/16/96	81	ORDER by Judge Barbara J. Rothstein motion in limine [78-1], DENYING motion for leave to reopen discovery to take depo of Sam McFarland [72-1], GRANTING motion for summary judgment [43-1], DENYING motion for summary judgment OA REQUESTED [39-1] (cc: counsel, Judge) (mg)
4/17/96	82	JUDGMENT by Clerk Bruce Rifkin: dft SAG's motion for summary judgment re: plaintiff's 1st cause of action claiming breach of duty of fair representation by entering and maintaining the CBA with Lakeside GRANTED; dft SAG's motion for summary judgment re: plaintiff's 1st cause of action claiming breach of duty of fair representation by SAG's application of 30 day grace period GRANTED; dfts' SAG and Lakeside's motion for summary judgment re: plaintiff's 2nd cause of action claiming breach of the CBA

DATE		PROCEEDINGS
		GRANTED; plaintiff's request to reopen discovery DENIED. (cc: counsel, Judge, Jgm. Book) Entered on: 4/17/96 (mg)
5/14/96	90	NOTICE OF APPEAL by plaintiff Naomi Marquez from Dist. Court decisions [81 and 82] (cc: CCA, Judge, counsel) (ss) [Entry date 05/20/96]

GENERAL DOCKET FOR
Ninth Circuit Court of Appeals

Court of Appeals Docket #: 96-35566

Filed: 5/28/96

* * * *

Marquez v. Screen Actors Guild, et al

Appeal from: Western District of Washington (Seattle)

* * * *

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
5/28/96	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): no. setting schedule as follows: appellant's opening brief is due 8/30/96; appellees' brief is due

DATE PROCEEDINGS

9/30/96; appellants' reply brief is due 10/15/96; COR HAS BEEN FILED. [96-35566] (sf)

9/3/96 Filed original and 15 copies Appellant Naomi Marquez opening brief (Informal: n) 57 pages and five excerpts of record in 2volumes; served on 8/30/96 [96-35566] (mhf)

10/17/96 Filed original and 15 copies appellee Screen Actors Guild's 55 pages brief, 1 Exc. vols:; served on 10/15/96 [96-35566] (mhf)

10/17/96 Filed original and 15 copies appellee Lakeside Productions's 9 pages brief, -0- Exc. vols:; served on 10/15/96 [96-35566] (mhf)

11/18/96 Filed original and 15 copies Naomi Marquez reply brief, (Informal: n) 30 pages; served on 11/14/96 [96-35566] (mhf)

7/7/97 ARGUED AND SUBMITTED TO Thomas M. Reavley, Diarmuid F. O'SCANNLAIN, Ferdinand F. FERNANDEZ [96-35566] (ah)

8/29/97 FILED OPINION: AFFIRMED IN PART, REVERSED IN PART, AND REMANDED. Each pty to pay its own costs (Terminated on the Merits after Oral Hearing; Affirmed (in part) and Reversed (in part); Written, Signed, Published. Thomas M. Reavley; Diarmuid F. O'SCANNLAIN, author; Ferdinand F. FERNANDEZ.) FILED AND ENTERED JUDGMENT. [96-35566] (mhf)

9/22/97 MANDATE ISSUED [96-35566] (mhf)

[Filed Dec. 12, 1994]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

NAOMI MARQUEZ,	)	
	)	
Plaintiff,	)	Civil Action No. C94-1831
	)	
vs.	)	**COMPLAINT FOR**
	)	**DECLARATORY,**
SCREEN ACTORS GUILD and	)	**INJUNCTIVE RELIEF**
LAKESIDE PRODUCTIONS,	)	**AND DAMAGES**
INC., a foreign corporation,	)	
	)	
Defendants.	)	
	)	

Naomi Marquez, plaintiff, by and through her undersigned counsel, as claims for relief against the defendants Screen Actors Guild and Lakeside Productions, Inc., states:

JURISDICTION AND VENUE

1. This Court has jurisdiction under 28 U.S.C.§§ 1331 and 1337(a) in that the claims for relief concern the interpretation and application of §§ 9(a) ("herein § 9(a)") and 301 ("herein § 301") of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 159(a) and 185, an Act of Congress regulating commerce. Venue is proper under 28 U.S.C. § 1391 and § 301.

PARTIES

2. Naomi Marquez ("Marquez") is a citizen of the United States and a resident within this federal district in the State of Washington. She is an "employee" within § 2 (3) of the NLRA, 29 U.S.C. § 152(3). Marquez is not a member of the Screen Actors Guild.

3. The Screen Actors Guild is a labor organization within § 2 (5) of the NLRA, 29 U. S. C. § 152 (5) which has its principal office in Hollywood, California. Through agreements and arrangements between them, the Screen Actors Guild, by itself or through its local or agent (herein collectively "SAG"), has been recognized by the defendant Lakeside Productions, Inc. under § 9(a) of the NLRA, as the "exclusive representative" of Lakeside's employees. SAG is subject to jurisdiction in this court pursuant to RCW 4.28.185 based on the facts hereinafter alleged.

4. Lakeside Productions, Inc. (herein "Lakeside") is a corporation organized under the laws of the State of California and is an "employer" within § 2(2) of the NLRA, § 29 U. S. C. § 152 (2) , and the employer of Marquez for purposes of the allegations of this complaint. Lakeside is subject to jurisdiction in this court pursuant to RCW 4.28.185 based on the facts hereinafter alleged.

FACTS

5. On August 29, 1994, Marquez, an actress, was advised by her talent agency, Thompson Media Talent ("Thompson") in Seattle, Washington, a nonparty to this suit, that she should appear at the casting office of Dixon Walker Casting ("Dixon Walker"), also a nonparty to this suit, to audition for a part in the television series "Medicine Ball" to be filmed in Seattle. She did so, read for the part, and Dixon Walker representatives determined that she should be "called back" for a second reading of the part. Dixon Walker gave Marquez directions to Lakeside's production headquarters in Seattle, Washington where she read for the part in front of the production's director, who advised Marquez that she was "very believable" in the role.

6. On August 31, 1994, Marquez was advised by Lakeside, through Dixon Walker and Thompson, that she "got the part" and would be booked for the episode filming on September 8, 1994. Marquez was then told, on September 3, 1994, also by Lakeside through Dixon Walker and Thompson, that, under agreements and arrangements that Lakeside has with SAG, she was a "must join" or a "must pay", and that she must contact, join, and pay dues and fees

in excess of $500 to SAG as a condition of being hired and employed to perform the "Medicine Ball" role on September 8.

7. On September 3, 1994, a courier delivered the "Medicine Ball" script to Marquez's home.

8. On September 6, 1994, counsel for Marquez by facsimile transmission sent a letter to Dixon Walker, with a copy to Lakeside, advising that under the NLRA:

A. Marquez could not be required to join SAG at any time;

B. Marquez could not be required to pay any fees to SAG for the first 30 day "grace period" of her engagement; and that

C. following the expiration of 30 days, Marquez could only be required to pay SAG a fee to defray the costs of "collective bargaining, contract administration, and grievance adjustment".

9. On September 7, 1994, Marquez was advised by Thompson that she had "lost the part" because she had not joined and/or paid dues or fees to SAG by the close of business, as required by the agreements and arrangements between SAG and Lakeside.

FIRST CLAIM FOR RELIEF
(DUTY OF FAIR REPRESENTATION VIOLATIONS)

10. Through agreements and arrangements with Lakeside, SAG maintains and enforces provisions for covered television productions which require performers, including those in the State of Washington such as Marquez, on productions such as "Medicine Ball", to become SAG members and/or pay dues or fees to SAG as a precondition of hire. Through the maintenance and enforcement of such provisions and requirements SAG is violating the rights under the NLRA of employees, such as Marquez:

A. to determine for themselves whether they wish to be SAG members;

B. to a 30 day "grace period" within which to,

(1) determine whether they wish to become members, and

(2) be free of demands for dues and/or fees, and

C. the post-"grace period" right to pay only a fee to defray SAG's costs of "collective bargaining, contract administration, and grievance adjustment".

11. By the acts and omissions described in ¶ 10, SAG has violated the duty of fair representation which requires that it not maintain and enforce agreements and arrangements which violate employees' rights under the NLRA; that it accurately advise employees of their rights and obligations under the NLRA, both at the time of hire and after they are hired; that it not act in an arbitrary, hostile, or discriminatory manner toward them; and that it otherwise act in good faith in exercising its statutory powers as "exclusive representative" under § 9(a).

SECOND CLAIM FOR RELIEF
(BREACH OF COLLECTIVE BARGAINING AGREEMENT)

12. SAG and Lakeside maintain and enforce collective bargaining agreements and arrangements which are contracts under § 301 of the NLRA. Section 301 limits the obligations that SAG and Lakeside can impose upon employees as a condition of their employment. Under the NLRA, collective bargaining agreements and arrangements cannot:

A. impose membership obligations upon employees;

B. cannot require the payment of dues and/or fees for the first 30 days of employment; and

C. cannot require, after the first 30 days of employment, that employees pay amounts in excess of a fee to defray the costs of "collective bargaining, contract administration, and grievance adjustment".

13. SAG and Lakeside maintain and enforce their collective bargaining agreements and arrangements against employees, such as Marquez in the State of Washington, which on their face and as applied violate the limitations described in paragraph 12. As a result, SAG and Lakeside violate the rights of employees, such as Marquez, which are implied in law to limit the language and enforcement of such agreements and arrangements.

REQUESTS FOR RELIEF

WHEREFORE, Marquez requests that this Court grant the following relief:

I. A declaratory judgment, under § 28 U.S.C. § 2201 that through the acts and omissions stated in the First Claim for Relief, SAG has violated its duty of fair representation;

II. A declaratory judgment, under § 28 U.S.C. § 2201 that through the acts and omissions stated in the Second Claim for Relief SAG and Lakeside have violated their obligations to maintain and enforce only lawful collective bargaining agreements and arrangements;

III. An injunction which requires SAG to cease and desist from violating its duty of fair representation in the ways alleged in the First Claim for Relief;

IV. An injunction which requires SAG and Lakeside to expunge any provisions from their collective bargaining agreements and arrangements which require employees to be members as a condition of their employment, which impose membership or financial obligations upon employees during the first 30 days of their employment, and which require employees after the expiration of 30 days of employment to pay amounts which exceed a pro rata share of SAG's costs of "collective bargaining, contract administration, and grievance adjustment".

V. An award against SAG and Lakeside of compensatory damages, including lost earnings and other compensation related benefits which Marquez has been denied by the acts and omissions alleged.

VI. The costs of this action, and reasonable attorneys' fees if the Court finds such fees appropriate. And

VII. Such other and further relief as the Court deems just and proper in the circumstances.

DATED this 9th day of December, 1994.

[Signature block omitted in printing]

[Filed Feb. 13, 1995]

UNITED STATE[S] DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

[Title omitted in printing]

ANSWER TO COMPLAINT OF DEFENDANT SCREEN ACTORS GUILD

Defendant Screen Actors Guild, Inc. ("SAG"), for itself and for no other defendant, hereby responds to the Complaint in this proceeding as follows:

1. In response to paragraph 1 of the Complaint, SAG lacks sufficient information as to the truth or falsity of the matters raised therein as they apply to the facts of this proceeding and, on that basis, denies the allegations of the said paragraph.

2. In response to paragraph 2 of the Complaint, SAG admits that Plaintiff Naomi Marquez ("Plaintiff ") is not a member of SAG. Except as so expressly admitted, SAG lacks sufficient information as to the truth or falsity of the remaining allegations in said paragraph, and, on that basis, denies the remaining allegations.

3. In response to paragraph 3 of the Complaint, SAG admits that it is a labor organization within the meaning of the National Labor Relations Act and that it is the exclusive bargaining representative of employees of Defendant Lakeside Productions, Inc. Except as so expressly admitted, SAG denies each and every other allegation in said paragraph.

4. In response to paragraph 4 of the Complaint, SAG admits that Defendant Lakeside is an employer within the meaning of the NLRA. Except as so expressly admitted, SAG lacks sufficient information as to the truth or falsity of the remaining allegations therein, and, on that basis, denies the remaining allegations.

5. In response to paragraph 5 of the Complaint, SAG lacks sufficient information as to the truth or falsity of the allegations raised therein and, on that basis, denies said allegations.

6. In response to paragraph 6 of the Complaint, SAG lacks sufficient information as to the truth or falsity of the allegations raised therein and, on that basis, denies said allegations.

7. In response to paragraph 7 of the Complaint, SAG lacks sufficient information as to the truth or falsity of the allegations raised therein and, on that basis, denies said allegations.

8. In response to paragraph 8 of the Complaint, SAG lacks sufficient information as to the truth or falsity of the allegations raised therein and, on that basis, denies said allegations.

9. In response to paragraph 9 of the Complaint, SAG lacks sufficient information as to the truth or falsity of the allegations raised therein and, on that basis, denies said allegations.

10. In response to paragraph 10 of the Complaint, SAG denies each and every allegation raised therein.

11. In response to paragraph 11 of the Complaint, SAG denies each and every allegation raised therein.

12. In response to paragraph 12 of the Complaint, SAG denies each and every allegation raised therein.

13. In response to paragraph 13 of the Complaint, SAG denies each and every allegation raised therein.

AFFIRMATIVE DEFENSES

1. As a first, separate and affirmative defense, SAG contends that the Complaint, and each claim therein, fails to state a claim on which relief can be granted.

2. As a second and affirmative defense, SAG contends that the Complaint fails to allege any unlawful conduct by SAG, its agents or representatives.

3. As a third, separate and affirmative defense, SAG contends that the Complaint is barred by the applicable statute of limitations.

4. As a fourth, separate and affirmative defense, SAG contends that the claim for relief against SAG is preempted by the National Labor Relations Act, 29 U.S.C. §151, et seq. and is subject to the exclusive jurisdiction of the National Labor Relations Board.

5. As a fifth, separate and affirmative defense, SAG contends that Plaintiff's claim is barred by her failure to exhaust internal union and administrative remedies.

6. As a sixth, separate and affirmative defense, SAG contends that Plaintiff is legally responsible and culpable, in whole or in part, for any and all damages claimed in this suit.

7. As a seventh, separate and affirmative defense, SAG contends that Plaintiff is guilty of laches.

8. As a eighth, separate and affirmative defense, SAG contends that Plaintiff is guilty of unclean hands.

9. As a ninth, separate and affirmative defense, SAG contends that the Complaint is violative of Rule 8 of the Federal Rules of Civil Procedure, in that it does not adequately notify the parties of the alleged civil wrongs for which they are being sued and the factual basis for that claim as it pertains to SAG.

10. As a tenth, separate and affirmative defense, SAG contends that the claim against SAG is frivolous and unwarranted and that it is entitled to sanctions pursuant to Rule 11 of the Federal Rules of Civil Procedure.

WHEREFORE, defendant SAG respectfully prays:

1. That Plaintiff take nothing by her Complaint;

2. That the Court enter an Order dismissing the Complaint against SAG, and rendering Judgement against Plaintiff and in favor of SAG;

3. For an Order awarding costs and reasonable attorneys' fees in favor of SAG and against Plaintiff; and

4. For such other and further relief as the Court deems appropriate.

Dated: February 10, 1995

[Signature block and Proof of Service omitted in printing]

[Filed Feb. 24, 1995]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

[Title omitted in printing]

ANSWER OF DEFENDANT LAKESIDE PRODUCTIONS, INC.

Defendant Lakeside Productions, Inc. ("Lakeside"), for itself and no others; for its answer to plaintiff's complaint (the "Complaint"), admits, denies and alleges as follows:

1. In answer to paragraph 1 of the Complaint, Lakeside lacks sufficient knowledge or information as to the truth or falsity of the

allegations set forth in paragraph 1 of the Complaint and, on that basis, denies the allegations of said paragraph.

2. In answer to Paragraph 2 of the Complaint, Lakeside is informed and believes, and on that basis admits, that plaintiff was not a member of the Screen Actors Guild ("SAG"). Lakeside lacks sufficient knowledge or information as to the truth or falsity of the remaining allegations set forth in paragraph 2 of the Complaint and, on that basis, denies the remaining allegations of said paragraph.

3. In answer to paragraph 3 of the Complaint, Lakeside is informed and believes, and on that basis admits, that SAG is a labor organization within the meaning of the National Labor Relations Act and that it is the exclusive bargaining representative of certain employees of Lakeside. Lakeside lacks sufficient knowledge or information as to the truth or falsity of the remaining allegations set forth in paragraph 3 of the Complaint and, on that basis, denies the remaining allegations of said paragraph.

4. In answer to paragraph 4 of the Complaint, Lakeside admits that it is a corporation organized under the laws of the State of California and that it is an employer within the meaning of the National Labor Relations Act. Lakeside alleges that the remaining allegations call for a legal conclusion and, on that basis, Lakeside denies each and every remaining allegation in paragraph 4 of the Complaint.

5. In answer to paragraph 5 of the Complaint, Lakeside admits that plaintiff auditioned for a part in the television series "Medicine Ball." Lakeside lacks sufficient knowledge or information as to the truth or falsity of the remaining allegations of paragraph 5 of the Complaint and, on that basis, denies the remaining allegations of said paragraph.

6. In answer to paragraph 6 of the Complaint, Lakeside admits that plaintiff was offered a part in "Medicine Ball." Lakeside further admits that when it contacted SAG regarding hiring plaintiff, SAG told Lakeside that plaintiff was a "must pay." Except as so expressly

admitted, Lakeside denies each and every remaining allegation in paragraph 6 of the Complaint.

7. In answer to paragraph 7 of the Complaint, Lakeside lacks sufficient knowledge or information as to the truth or falsity of the allegations of paragraph 7 of the Complaint and, on that basis, denies the allegations of said paragraph.

8. In answer to paragraph 8 of the Complaint, Lakeside admits that on or about September 6, 1994, Lakeside received a copy of a letter from counsel for Marquez. Lakeside further admits that the letter speaks for itself. Lakeside lacks sufficient knowledge or information as to the truth or falsity of the remaining allegations set forth in paragraph 8 of the Complaint and, on that basis, denies the remaining allegations of said paragraph.

9. In answer to paragraph 9 of the Complaint, Lakeside admits that Lakeside was informed by SAG that plaintiff was a "must pay." Lakeside lacks sufficient knowledge or information as to the truth or falsity of the remaining allegations set forth in paragraph 9 of the Complaint and, on that basis, denies the remaining allegations of said paragraph.

10. In answer to paragraph 10 of the Complaint, Lakeside denies each and every allegation of paragraph 10 of the Complaint.

11. In answer to paragraph 11 of the Complaint, Lakeside alleges that the allegations in paragraph 11 of the Complaint call for a legal conclusion and, on that basis, Lakeside denies each and every allegation of said paragraph.

12. In answer to paragraph 12 of the Complaint, Lakeside denies each and every allegation of paragraph 12 of the Complaint.

13. In answer to paragraph 13 of the Complaint, Lakeside denies each and every allegation of paragraph 13 of the Complaint.

AFFIRMATIVE DEFENSES

By way of further answer, Lakeside asserts the following affirmative defenses:

FIRST AFFIRMATIVE DEFENSE
(Failure to State a Claim)

14. The Complaint fails to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE
(Statutes of Limitation)

15. Plaintiff's claims are barred by applicable statutes of limitation.

THIRD AFFIRMATIVE DEFENSE
(Material Breach of Employment Obligations)

16. Plaintiff materially breached her obligations under the labor agreements that governed her employment.

FOURTH AFFIRMATIVE DEFENSE
(Good Cause)

17. Lakeside had good cause for any actions it took with respect to plaintiff under the applicable collective bargaining agreement.

FIFTH AFFIRMATIVE DEFENSE
(Laches)

18. Plaintiff's claims for relief are barred under the doctrine of laches.

SIXTH AFFIRMATIVE DEFENSE
(Waiver)

19. Plaintiff's claims for relief are barred under the doctrine of waiver.

SEVENTH AFFIRMATIVE DEFENSE
(Estoppel)

20. Plaintiff's claims for relief are barred under the doctrine of estoppel.

EIGHTH AFFIRMATIVE DEFENSE
(NLRA Preemption)

21. This Court lacks jurisdiction over the claims asserted against Lakeside because such claims are preempted by the National Labor Relations Act, 29 U.S.C. §151, et seq. The National Labor Relations Board has exclusive jurisdiction over such claims.

NINTH AFFIRMATIVE DEFENSE
(No Unlawful Conduct)

22. Plaintiff has failed to allege any unlawful conduct by Lakeside, its agents or representatives.

TENTH AFFIRMATIVE DEFENSE
(Exclusive Remedy Under Collective Bargaining Agreement)

23. Plaintiff's exclusive remedy for the alleged wrongs complained of herein is the grievance and arbitration process contained in the applicable collective bargaining agreement.

ELEVENTH AFFIRMATIVE DEFENSE
(Comparative Fault)

24. Plaintiff and/or others over whom Lakeside has no control are 100% responsible for any damages and/or liability as alleged herein. In the alternative, if Lakeside is deemed to be responsible for

any damages and/or liability as alleged herein, Lakeside is only responsible for that portion for which it was at fault and not any portion for which plaintiff or others were at fault.

TWELFTH AFFIRMATIVE DEFENSE
(Failure to Exhaust Internal Union Remedies)

25. The Complaint is barred by plaintiff's failure to exhaust internal union remedies pursuant to the constitution and bylaws of her collective bargaining representative.

THIRTEENTH AFFIRMATIVE DEFENSE
(Failure to Mitigate)

26. Lakeside is informed and believes, and based thereon alleges, that plaintiff has failed to make reasonable efforts to mitigate the alleged damages she claims to have suffered. Accordingly, the relief, if any, to which plaintiff is entitled must be diminished by the extent of her actual earnings during this period and/or the amount which she reasonably could have earned, whichever is greater.

FOURTEENTH AFFIRMATIVE DEFENSE
(Indemnity and Contribution)

27. If Lakeside is found liable to the plaintiff, it is entitled to indemnity, contribution, reimbursement and/or apportionment from SAG for all or any portion of any amount upon which it is found obligated.

FIFTEENTH AFFIRMATIVE DEFENSE
(Adequate Remedy at Law)

28. While Lakeside denies any liability here, should plaintiff establish liability, she has an adequate remedy at law and therefore is not entitled to equitable relief.

WHEREFORE, defendant Lakeside Productions, Inc. respectfully requests that this Court enter judgment for it and against plaintiff Naomi Marquez, and

(a) dismiss the Complaint with prejudice;
(b) award to Lakeside its costs and expenses incurred in defending this action, together with reasonable attorneys' fees; and
(c) grant Lakeside such other and further relief as the Court deems just and proper.

DATED: February 23, 1995

[Signature block and Certificate of Service omitted in printing]

[Filed Dec. 28, 1995]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

[Title omitted in printing]

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff Naomi Marquez moves, pursuant to Federal Rule of Civil Procedure 56, for summary judgment in her favor on the ground that the pleadings in this case, Lakeside's Response to Plaintiff's First Set of Interrogatories to Defendant Lakeside Productions, Inc. ("Lakeside"), and the declaration, depositions, and exhibits which we file with this motion show that there is no genuine issue as to any material fact and that Plaintiff is entitled to judgment as a matter of law. In support of this motion, Plaintiff states as follows:

1. Lakeside is an "employer" under § 2(2) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 152(2). (Compl. ¶ 4 *admitted* SAG's Answer ¶ 4 *and* Lakeside's Answer ¶ 4.)

2. Defendant Screen Actors Guild ("SAG" or "Union") is a "labor organization" under § 2(5) of the NLRA, 29 U.S.C. § 152(5). It is the "exclusive representative" under § 9(a), 29 U.S.C. § 159(a),

of performers employed by Lakeside. (Compl.¶ 3 *admitted* SAG's Answer ¶ 3 *and* Lakeside's Answer ¶ 3; Walker Dep. Ex. 7 at 1.)

3. In July 1994, Lakeside and SAG entered into a collective bargaining agreement, which was in effect at all material times. (Shapiro Dep. at 20-29; Shapiro Dep. Exs. 23-25.) This agreement contained a "Union Security" provision. This provision required, as a condition of employment by Lakeside, that every performer who had been employed as a performer "in the motion picture industry" thirty days or more before the beginning of their employment by Lakeside "be a member of the Union in good standing" and "tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union." (Walker Dep. Ex. 7 at 5-6; Shapiro Dep. at 28-29.) In accordance with that provision, Lakeside agreed to clear all performers with "the department at the Guild known as 'Station 12'" to determine their SAG "membership status." (Walker Dep. Ex. 4 at 1; Shapiro Dep. at 41-43.)

4. Heidi Walker, of Dixon/Walker Casting ("Dixon/Walker"),was the Casting Director for Lakeside on several episodes of the television series "Medicine Ball." (Walker Dep. Ex. 12A; Walker Dep. I at 10, 102-05). Thompson Media Talent ("Thompson Media") is Naomi Marquez's talent agency. (Marquez Dep. at 11).

5. Ms. Marquez has never been a member of SAG. (Marquez Dep. at 11). On August 29, 1994, she auditioned for a part in an episode of "Medicine Ball" entitled "Heart & Sole." (Marquez Dep. at 16-18, 20-23; Ricketts Dep. at 19-21, 70-71).

6. On August 30 or 31, 1995, Lakeside, through Dixon/Walker and Thompson Media, offered Ms. Marquez a part in an episode of "Medicine Ball" titled "Heart & Sole." (Compl. 6 *admitted* Lakeside's Answer 6; Thompson Dep. at 25; Walker Dep. I at 66-68, 108; Walker Dep. Ex. 8 at 1; Ricketts Dep. at 24, 29-30.) Ms. Marquez accepted this offer. (Thompson Dep. at 27-28; Walker Dep. I at 40-41, 68-69; Walker Dep. Ex. 8 at 1; Ricketts Dep. at 29-30.)

7. On August 31, 1995, Lakeside, through Dixon/Walker, contacted SAG's Station 12 to obtain clearance on Ms. Marquez.

Station 12 advised Lakeside, through Dixon/Walker, that Ms. Marquez had worked on a prior SAG production in 1989 and, therefore, was either "must join" or "must pay." (Walker Dep. Exs. 5, 6A, 8 at 1; Ricketts Dep. at 41-43, 50-53; Walker Dep. at 36-38.) Lakeside in turn, through Dixon/Walker and directly, notified Ms. Walker through Thompson Media that she was either "must join" or "must pay" and must pay an initiation fee and dues to SAG before her part was shot on September 8, 1995. (Thompson Dep. at 28-31, 35-37, 40; Ricketts Dep. at 48-49; Fuhriman Dep. at 42, 68; Walker Dep. I at 73; Walker Ex. 8 at 1).[1]

8. According to SAG, the required initiation fee and dues totaled more than $500. Ms. Marquez, was unable to obtain that amount of money to pay SAG before the filming of the part offered her. (Marquez Dep. at 28-29; Fuhriman Dep. at 69, 91-92). On September 6, 1994, Dixon/Walker received by facsimile transmission from Thompson Media a letter from Ms. Marquez's then counsel, Hugh L. Reilly, Esq., advising that under the NLRA: (a) Ms. Marquez could not be required to join SAG anytime; (b) Ms. Marquez could not be required to pay SAG any monies as a condition of employment until after thirty days of employment with Lakeside; and, (c) after thirty days, Ms. Marquez could only be required to pay SAG a fee to defray the costs of "collective bargaining, contract administration, and grievance adjustment." (Ricketts Ex. 18; Ricketts Dep. at 63-65; Thompson Dep. at 44.)

9. Ms. Marquez did not pay the initiation fee and dues, and SAG did not waive its requirement that she pay them, before 5:00 p.m. on September 7, 1995. Consequently, despite Mr. Reilly's letter, Lakeside replaced Ms. Marquez with another actress before it filmed the part on September 8, 1994. (Walker Ex. 11; Walker Dep. I at 89-93; Ricketts Dep. at 35-36, 69; Fuhriman Dep. at 68; Lakeside's Resp. to Pl.'s Interrogs. 9, 17-18.)

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[1] The evidence is contradictory about whether the term used was "must join" or "must pay". This disputed issue of fact is immaterial to this Motion.

10. The part Ms. Marquez was offered, but was not permitted to perform, would have paid her $555.00. (Lakeside's Resp. to Pl.'s Interrog. 19.)

11. On these undisputed facts, and as a matter of law, SAG breached the judicially created fiduciary duty of fair representation it owed Ms. Marquez, because it:

a. negotiated and maintained an agreement that on its face unlawfully purports to require as a condition of employment:

i. "member[ship]...in good standing";

ii. "membership...thirty (30) days after...first employment as a performer in the motion picture industry," rather than thirty days after employment by Lakeside; and,

iii. payment of "the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union";

b. failed to inform Ms. Marquez that her maximum legal obligation to SAG under the "Union Security" provision was the payment, after thirty days of employment by Lakeside, of a fee to defray the costs of "collective bargaining, contract administration, and grievance adjustment"; and,

c. unlawfully enforced the "Union Security" provision to require Ms. Marquez to pay:

i. its full dues and initiation fee

ii. before thirty days of employment by Lakeside.

12. On these undisputed facts, and as a matter of law, SAG and Lakeside breached their collective bargaining agreement by unlawfully enforcing the "Union Security" provision to require Ms. Marquez to pay SAG's full dues and initiation fee before thirty days of employment by Lakeside, because the duty of fair representation and the limitations of § 8(a)(3) on compulsory unionism provisions are as a matter of law implied terms of that collective bargaining agreement.

13. In support of this motion, Plaintiff submits a Brief showing that she is entitled to judgment as a matter of law on the undisputed facts set forth in this Motion. Plaintiff also files her Declaration and copies of Lakeside's Response to Plaintiff's First Set of Interrogatories to Defendant Lakeside and the depositions, with exhibits, of the following: Naomi Marquez, Heidi Walker (Vol. I), Ingrid Fuhriman, Deedra L. Ricketts, Scott Thompson, and Vicki G. Shapiro.

WHEREFORE, Plaintiff Naomi Marquez asks that this Court enter summary judgment in her favor that awards her the declaratory and injunctive relief requested in her Complaint, damages of $555. 00, with interest, and such other and further relief as the Court deems just and proper.

[Signature block omitted in printing]

DATED: December 27, 1995

[Declaration of Service omitted in printing]

[Filed Dec. 28, 1995]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Title omitted in printing]

DEPOSITION UPON ORAL EXAMINATION
OF
HEIDI WALKER, Vol. I

* * * *

SEATTLE WASHINGTON; TUESDAY, OCTOBER 24, 1995

* * * *

[32]Q [By Mr. LaJeunesse:] And how did you know that the process you had to follow as casting director was to make this phone call to Station 12?

[33]A Because it's what I had to do when I was at Warner Brothers. It's what I had to do when I was working on Northern Exposure. If it's a SAG show, this is the process.

Q Is that written down anywhere?

A It's in the SAG agreement handbook, which quite frankly, if you asked me to find it today, I probably couldn't because it's something I've known ever since I've gotten into the business. It's the way I was taught. And it's just the same as if it's an AFTRA job, you have to call and get people cleared through the AFTRA office.

* * * *

[44]Q (By Mr. LaJeunesse) We can go on the record.

Miss Walker, while we were continuing with the deposition, you sent your assistant Deedre back to your office to bring for us what you call your SAG handbook, correct?

A Right.

Q And do you now have that?

A Yes.

Q And could you describe that, please?

A The SAG handbook — it's a SAG handbook with the basic agreements of independent producers.

Q Could you read the title?

A Screen Actors Guild, Codified Basic Agreement of 1989 For Independent Producers.

Q And is that the only thing that you call your SAG handbook?

A Yeah.

* * * *

[47] (Marked for identification Exhibit No. 7.)

Q (By Mr. LaJeunesse) Ms. Walker, you've been handed a document which has been marked as deposition Exhibit 7, and can you tell me or would you tell me, please, whether this is an excerpt from a document that you've identified as Screen Actors Guild — I am sorry — that you've identified as the Screen Actors Guild handbook, which is the Screen Actors Guild Codified Basic Agreement of 1989 for Independent Producers?

A It looks like it.

Q Would you compare page 1, or actually page 2, of the exhibit, which is the first page of the agreement itself, correct?

A Uh-huh.

Q And pages 5, pages numbered 5 through 8 of the exhibit are pages 5 through 8 of the Codified Basic Agreement, correct?

A It looks like it.

Q So that's all I've done is excerpted the preamble and the union security provisions.

* * * *

[49]Q So all of the portions, as far as you know, in the contract applied to the Station 12 process are in what's marked deposition Exhibit 7?

A Without me sitting and reading it again, I'd have to say yeah from what I can see. There's — it covers it.

* * * *

[Filed Dec. 28, 1995]

[UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON]

EXHIBIT 7 TO DEPOSITION OF HEIDI WALKER

[Reporter's stamp and cover page omitted in printing]

SCREEN ACTORS GUILD
CODIFIED BASIC AGREEMENT OF 1989
FOR INDEPENDENT PRODUCERS

* * * *

GENERAL PROVISIONS

* * * *

2. UNION SECURITY

A. Every performer hereafter employed by any Producer, whether by contract or otherwise, or who acts before the camera, or who makes sound track within the Union's jurisdiction, for any Producer, shall be a member of the Union in good standing.

B. The foregoing subsection A, requiring as a condition of employment membership in the Union, shall not apply until on or after the thirtieth day following the beginning of such employment or the effective date of this Agreement, whichever is the later; the Union and the Producers interpret this sentence to mean that membership in the Union cannot be required of any performer by a Producer as a condition of employment until thirty (30) days after his first employ-

ment as a performer in the motion picture industry; "first employment" meaning the first employment as a performer in the motion picture industry on or after August 10, 1948. The foregoing sentence shall be deemed inoperative if any of the following events shall occur: (a) if the Labor Management Relations Act of 1947 is repealed; or (b) if the provision of such Act to which the foregoing sentence has reference is repealed or modified so the foregoing sentence is unnecessary to comply with such Act; or (c) if such Act or such provision is held unconstitutional by the Supreme Court of the United States. The Producer shall not be held to have violated this paragraph if it employs a performer who is not a member of the Union in good standing, if the Producer has reasonable grounds for believing that membership in the Union was not available to such performer on the same terms and conditions generally applicable to other members, or if the Producer has reasonable grounds for believing that membership in the Union was denied to such performer or such performer's membership in the Union was terminated for reasons other than the failure of the performer to tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union; provided, however, the Producer shall not be deemed to have such reasonable grounds for believing until he has made inquiry of the Union as to the facts. The preceding sentence shall be deemed inoperative if any of the following events shall occur: (a) if the Labor Management Relations Act of 1947 is repealed; or (b) if the provision of such Act to which the preceding sentence has reference is repealed or modified so the preceding sentence is unnecessary to comply with such Act; or (c) if such Act or such provision is held unconstitutional by the Supreme Court of the United States.

C. It is agreed that every extra performer hereafter employed by any Producer, whether by contract or otherwise, or who performs before the camera for any Producer, shall be a member of the Union in good standing as a condition of employment on or after the thirtieth (30th) day following the completion of his/her third (3rd) day of employment as an extra performer with the motion picture industry; "employment" meaning employment as an extra performer under the terms of this Agreement on or after the 25th day of March, 1990. The foregoing requirement of Guild membership as a condition of

employment shall be subject to the obligations of the parties under existing law.

The provisions of this Section 2 with respect to extra performers shall only apply in the applicable respective "extra zone" as above in Section 1.C(l)-(10) defined by the parties, and no employment or use of a person as an extra performer beyond such respective "extra zone" shall be subject to this Section or to be considered as employment within the purview hereof.

Employment of individuals pursuant to the provisions of Schedule J. 2. hereof, entitled "Waivers," shall not be construed to be "employment as an extra performer in the motion picture industry;" nor shall anything in this Agreement be construed as diminishing the rights of Producer under said Schedule J, Section 2.

D. Each Producer shall give the Union full opportunity to check performance by such Producer of its agreement under this Section including access to sets, but the Union's checking shall be done in such a manner as not to interfere with production. The Union agrees that it will accept as a member of the Union any performer the Producer wishes to employ, but the Union may refuse such admission or, if it sees fit, admit on terms, performers suspended or expelled by the Union or by any branch of the Associated Actors and Artistes of America or by any other performers' union Nothing herein shall limit the right of the Union to discipline, suspend or expel a member or to refuse to re-admit him. The Union agrees, however, that it suspends or expels a member who is under contract to a Producer, or if a member resigns, the suspension, expulsion or resignation shall not affect the performer's obligation to perform any existing contract or contracts with such Producer or such Producer's right to demand performance, unless the Producer otherwise consents. Subject to the qualifications hereinafter set forth, the Producer agrees that in every future contract it enters into with a performer, the performer shall agree that the performer shall be a member of the Union in good standing and shall remain so for the duration of the contract. Any non-member of the Union and any suspended or expelled member whom the Producer may be lawfully entitled to employ under this Agreement shall be paid the same minimum salary and shall be given the same

working conditions as are provided in this Agreement. No breach by a member of the Union of his obligation to the Union shall give such member a defense to any Producer's right to enforce an existing contract against such member.

E. The Producer agrees to report to the Union in writing within fifteen (15) days of the first employment of a non-member of the Union, (or within twenty-five (25) days of the first employment of a non-member of the Union on an overnight location), giving the non-member's name, Social Security Number and his first date of employment. An inquiry by any Producer to the Union as to the first date on which a performer has been employed in the industry shall be answered by the Union, and its answer shall bind the Union, and the Producer, if it acts in good faith, shall not be liable for acting on such answer, but the Producer who failed to report shall be liable to the Union for such failure to report. The inquiry provided for in the preceding sentence may be made before, on or one (1) business day after the date of employment.

F. The interpretation contained in the first sentence of subsection B. of this Section 2 has been approved by an advisory opinion of the General Counsel of the National Labor Relations Board. It such approval of such sentence is changed by a ruling of such General Counsel, then the new ruling of such general counsel shall prevail, until the same is overruled by the Board or a court of competent jurisdiction. If the Board or a court of competent jurisdiction shall change said ruling in a proceeding in which the Union is a party, then the new ruling or opinion shall prevail, until the same is reversed by a court of competent jurisdiction.

G. The Producer shall pay to the Union as liquidated damages for each employment of a performer in violation of the provisions of this Section 2 the sum of $500 and for each employment of an extra performer in violation of the provisions of this Section 2 the sum of $436, it being agreed that the actual damages suffered by the Union for such breach would be incapable of ascertainment.

H. The Union agrees that it will not impose unreasonable dues or assessments. If Producer claims a violation by the Union of the

provisions of this subsection H, such question shall be handled by conciliation and, if necessary, by arbitration in accordance with the provisions of Section 9 hereof. It is the intention of the parties to prevent the Union from closing its books so as to prevent any person who wishes to act in motion pictures from joining the Union. Nothing in the preceding sentence shall limit the right of the Union to discipline or suspend or expel a member or to refuse to re-admit him.

I. It is agreed that performers under four (4) years of age and extra performers under fourteen (14) years of age are not subject to the Union Security provisions of this Agreement.

J. Whenever any Producer is entitled hereunder to a permit or waiver from the Union, the Union agrees to issue the same without cost.

K. Any breach of the provisions of this Section shall be subject to arbitration between the Union and the Producer under Section 9 of these General Provisions.

[Filed Feb. 28, 1995]

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Title omitted in printing]

DEPOSITION UPON ORAL EXAMINATION
OF
INGRID FUHRIMAN

* * * *

SEATTLE, WASHINGTON; WEDNESDAY, OCTOBER 25, 1995

* * * *

[12]Q [By Mr. Quinonez] So do you advise people you represent that they should not become members of the Screen Actors Guild?

A I generally think that that is something that the person has to decide for themselves. I usually give them their options, explain to them the advantages. If they're looking to going to L.A. I usually say join and be a full member. If they're staying in Seattle, I usually [13] say let me explain to you or give you some information about going financial core because it will provide you more opportunities here.

Q When you say financial core, what do you mean?

A Financial core is a term I'm quite familiar with. A financial core member is required to pay only for the collective bargaining agreement with the union as is not required to pay for any of the political agenda or any other items. And that was the reason that this was set up. However, the fallout from that is you can do both union and nonunion work. And it's just very beneficial for my employees, not employees, but for the parties I represent to be able to do both.

Q Have you ever in the past encouraged talent that you represent to become financial core?

A Yes, in the case of my own son. I felt it would maximize his options. Usually I leave the options open to the person.

* * * *

[54]Q Did you say to Heidi Walker that Mr. Reilly was involved and that a suit would be brought?

A No, in fact there was no indication at that point that a suit would be brought. I told her only that as a friend, and I used that term, because we work together all the time, I said as a friend it's my understanding [55] from my conversation with an attorney that there's a possibility you may be

treading on the edges of being in violation of the law. I did inform her of what Mr. Reilly had said to me in our telephone conversation regarding the terminology must join, for one thing, which I think is why she changed it from that point on. But I just said I believe she needed to consider her own position in the matter, as a friend.

MR. LENCI: With all due respect, I move to strike the portion of the answer that was speculating what was in Ms. Walker's mind as speculation and not responsive.

MR. LAJEUNESSE: I'm sorry. I did not hear anything that was speculation as to what was in Ms. Walker's mind.

MR. LENCI: The record will speak for itself. But the witness keeps referring to Heidi must have thought this or must have that, so I would just request you direct your answers to what you observed and what people said.

Q (By Mr. Quinonez) What else did you say to Ms. Walker about the fact that Hugh Reilly was involved?

A Nothing. But I certainly did not say there would be a lawsuit because there certainly had been no determination at that point to that effect since you [56] asked that earlier.

Q To the best of your recollection, that would have occurred before the Labor Day weekend?

A It did, as I recall, occur before the Labor Day weekend. At this point Heidi said but I have to work with this union contract. Lakeside has a contract with the union and we are obligated to work with that contract. And I said, Heidi, we're also obligated to live by the laws of the United States. If there's a conflict, more or less, regard the side of the conflict you want to be on.

* * * *

[78]Q So you understand from Heidi then, who you believed to be a spokesperson from Lakeside, that there was a contract between Lakeside and the Screen Actors Guild, right?

A Yes, I believe that's correct.

Q And that from Lakeside's point of view that contract had certain specifications and limitations on Lakeside's hiring of people to be on shows, right?

MR. LAJEUNESSE: Objection. Calls for speculation as to Lakeside's position, what Lakeside thought.

Q (By Mr. Lenci) You can answer the question.

A Would you restate it?

Q I'm trying to understand what you learned from Heidi Walker, and the first part of that is that you understood from Heidi Walker that Lakeside had a [79] contract with the Screen Actors Guild, right?

A Yes, sir.

Q And that that contract by its terms had limitations and restrictions on Lakeside's employing people that were not SAG members, right?

A Yes, sir. Specifically Heidi Walker said to me after Naomi had already been hired, i.e., booked, we can't hire her until she joins the union.

* * * *

[Filed Dec. 28, 1995]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

[Title omitted in printing]

DEPOSITION UPON ORAL EXAMINATION OF SCOTT THOMPSON

Wednesday, November 15, 1995

* * * *

Seattle, Washington

* * * *

[10]Q [By Mr. Quinonez] What did Ms. Fuhriman say to you about the term "financial core"?

A She said that it was a provision made whereby an actor who establishes themselves as a union talent is able to either do union or non-union work by means of writing a letter of intent to the union that they're associated with declaring themselves financial core.

Q What is your understanding of what financial core means if you declare yourself financial core, what's the effect of that as far as you know?

A As far as I know it is a matter where the actor only pays for the portion of the dues that go toward collective bargaining.

Q In your experience, people who are not members of the Screen Actors Guild, for example, even though they are not members they can still work on a union production, is that correct?

A Yes.

* * * *

[24]Q Your understanding then is that she had it on her resume as a strategy for being more marketable, correct?

A Perhaps.

MR. LAJEUNESSE: Objection. Calls for speculation.

A Perhaps.

Q (By Mr. Quinonez) While not all talent necessarily use "SAG eligible" on their resumes, it's not uncommon for talent to use those words on their resumes?

A Yes, it is not uncommon.

Q You say it is not uncommon?

A It is not uncommon.

* * * *

[30]Q Now, based on you testimony earlier today regarding financial core and your knowledge of the concept of financial core, is it your understanding that "must join" really means that you either "must join" or you "must pay" a fee to the Screen Actors Guild?

MR. LAJEUNESSE: What time are we talking about, understanding then or now?

Q Was it your understanding then, in September 1994.

A My understanding was that "must join" meant paying the required financial obligation. Beyond that I'm not aware of specifically what happens with paperwork or contracts.

[Filed Dec. 28, 1995]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

[Title omitted in printing]

DEPOSITION OF
VICKI GUTIN SHAPIRO

LOS ANGELES, CALIFORNIA

NOVEMBER 16, 1995

* * * *

[22]Q BY MR. LaJEUNESSE: If you'll look at the first paragraph of Exhibit 23, Ms. Shapiro, it says that Lakeside Productions will perform ". . . all terms and obligations under the Screen Actors Guild Television Agreement of 1992. . . .

Do you know what that agreement is?

A Yes, I do.

Q Could you tell me what it is?

A The agreement is our television agreement -- I don't know how to describe it other [23] than with these words. It's our collective bargaining agreement applicable to production in the television area which was negotiated in '92, and its term was from '92 to '95.

Q Was that a single document?

MR. QUINONEZ: Well, I'm going to have to object. If you are asking her what her understanding is of what Elliot Friedgen might have meant when he wrote these words, there is no foundation.

The witness has testified she's never seen this letter before. I think it's inappropriate for you to ask her questions about what was intended in this letter. If you want to know what she thinks, what her opinion is -- it's irrelevant -- of what was intended here -- but I think you have the wrong witness.

MR. LaJEUNESSE: Well, let me mark another document.

That is No. 24.

(Plaintiff's Exhibit 24 was marked for identification by the Reporter.)

Q BY MR. LaJEUNESSE: Ms. Shapiro, you have been handed a document which is marked for identification purposes as Exhibit 24.

Ignoring the number stamp down in the right-hand corner which was placed there by Defendant [24] Lakeside, are you familiar with this document?

A Yes, I am.

Q And could you tell us what it is?

A This is the 1992 memorandum of agreement between independent producers, both motion picture and television, and Screen Actors Guild.

Q And in this case, it's specifically an agreement with Lakeside Productions; correct?

A That's correct.

Q Is this a standard agreement which is made with more than one producer and just fill in the blank for the name of the producer?

A I'm sorry, yes, this was a contract that is pretty much a standard contract.

Q Does this agreement itself contain a union security provision?

MR. QUINONEZ: Well, I'm going to object in that the document speaks for itself, and also it refers to other documents, so can you be more specific?

Q BY MR. LaJEUNESSE: Well, I asked if this document itself contains a union security provision, or does it contain one only by virtue of incorporation by reference to other documents?

THE WITNESS: May I?

MR. QUINONEZ: Go ahead.

[25] THE WITNESS: I would want to flip through to verify it --

Q BY MR. LaJEUNESSE: Certainly.

A -- but I do not believe that this document contains a union security provision.

It does, of course make reference to other documents which contain a union security provision. In quickly flipping through the document, I do not see any reference to any modification of the union security provision.

Q Based on your experience and familiarity with the collective bargaining contracts between Screen Actors Guild and television producers, would you -- do you believe that this is the Screen Actors Guild TV agreement of 1992 that's referred to in Exhibit 23, that is, the letter from Mr. Friedgen to Ms. Berg?

A No. This is just the memorandum of agreement, and you'll see in this document that it makes reference to and incorporates by reference the codified basic of '89, and if you read all of these documents together you have the contract to which Mr. Friedgen is making reference.

* * * *

[27] (Plaintiff's Exhibit 25 was marked for identification by the Reporter.)

Q BY MR. LaJEUNESSE: Have you had a chance to review that?

A I haven't read it word for word. I do see that it's the Television Adherence Letter that's executed by someone on behalf of Lakeside Productions, Inc.

Q Have you seen this particular document before?

A I believe so.

Q Again, is this a standard form agreement?

A Yes, it is.

Q Is Exhibit 25 part of the collective bargaining agreement between the Screen Actors Guild and Lakeside Productions?

A Well, it's the Adherence Letter which binds the producer to the collective bargaining agreement.

Q Paragraph 1 of Exhibit 25, like Paragraph 3 of Exhibit 24, refers to the "Screen Actors Guild Codified Basic Agreement Of 1989 For Independent Producers" and the "Screen Actors Guild Television Agreement Of 1989 For Independent Producers." And in addition, refers to a "1992 Memorandum Of Agreement."

[28] I hand you a document which has been previously marked as Exhibit 7.

For your information, I will say that we earlier stipulated that this Exhibit 7 is an excerpt from the Screen Actors Guild Codified Basic Agreement Of 1989 For Independent Producers, which is a bound --yellow bound, printed volume.

A That's correct.

Q Is the agreement from which Exhibit 7 is an excerpt the Screen Actors Guild Codified Basic Agreement Of 1989 For Independent Producers that is referred to in both Exhibit 24 and 25?

A Yes.

Q And I take it from your testimony that Lakeside was a party to the agreement from which Exhibit 7 is an excerpt by virtue of the agreement between SAG and -- or the Television Adherence Letter, Exhibit 25; correct?

A Yes.

Q To your knowledge, was Lakeside a party to the agreement from which Exhibit 7 is excerpted other than by virtue of the bilateral agreement it signed with the Screen Actors Guild in 1994?

MR. QUINONEZ: I'm going to object insofar as it calls for a legal conclusion and is vague and [29] ambiguous.

But you can answer if --

THE WITNESS: I'm afraid I'll need to hear the question again now.

Q BY MR. LaJEUNESSE: Sure.

To your knowledge, was Lakeside Productions a party to the agreement of which Exhibit 7 is part, other than by virtue of the two-party agreement reflected in the Television Adherence Letter that's Exhibit 25?

A No.

Q Do you know when Lakeside Productions was incorporated?

A I have no idea.

Q Exhibit 7 is primarily the union security provisions of the Screen Actors Guild Codified Basic Agreement Of 1989 For Independent Producers.

That is the union security provision which governed employment on "Medicine Ball"; correct?

A Yes.

Q Were these the only union security provisions which applied to the production of "Medicine Ball"?

A Yes.

• • • •

[38] Q In August and September of 1994, Ms. Shapiro, did you understand that employees could not be required to be a member of the Screen Actors Guild in good standing as a condition of employment?

MR. QUINONEZ: I'm going to object to that as calling for a legal conclusion and being vague and ambiguous.

But if you understand it, you can answer.

THE WITNESS: Could I hear it back or --

Q BY MR. LaJEUNESSE: Sure.

A -- from somebody.

(The question was read.)

THE WITNESS: Yes.

Q BY MR. LaJEUNESSE: In August and September 1994, were you aware of the Supreme Court's decision in Communications Workers versus Beck?

A Yes.

Q Had you prior to August 1994 made any effort to see that the employees of the Screen Actors Guild who were responsible for enforcing union security [39] provisions were aware of the -- of what the Supreme Court held in the Beck case?

A I -- Oops. Sorry.

MR. QUINONEZ: Let me just object for the record as the question is compound, it is vague and ambiguous, and it assumes facts not in evidence.

Are you asking her if SAG undertook to advise its own employees, or are you asking her if she undertook to advise her own employees?

MR. LaJEUNESSE: If she undertook as -- in her position with SAG to see that the Screen Actors Guild -- employees of the Screen Actors Guild who enforce union security provisions were aware of what the Supreme Court held in Beck.

MR. QUINONEZ: And you are saying prior to -

MR. LaJEUNESSE: Prior to the events which gave rise to this lawsuit.

THE WITNESS: Screen Actors Guild of course took steps to ensure that the appropriate employees had the information that they needed, and I was part of that effort.

Q BY MR. LaJEUNESSE: And how -- And this was with regard to what --

Your answer is directed to what Beck held; correct?

[40] A That's correct.

Q And was that done in writing?

A Yes, I believe so. I would have to check my files, though, to ascertain precisely what sort of memos went out. And I am confident that there were also meetings.

* * * *

[Filed Dec. 28, 1995]

[UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON]

EXHIBIT 29 TO DEPOSITION OF VICKI G. SHAPIRO

[Western Union Logo and illegible portions of date stamp omitted in printing]

LA469 LONG PD=SX LOSANGELES CALIF 4 254p= 1948 AUG
JACK DALES, SCREEN ACTORS GUILD=
7046 HOLLYWOOD BLVD HD=

IN RPLY TO YOUR TELEGRAM AND LETTER OF JULY 23 TO MR DENHAM AND YOUR TELEPHONE CONVERSATIONS OF JULY 30 WITH MR FINDLING BE ADVISED THAT THE MATTER HAS BEEN DISCUSSED WITH MR LEBARON AND THE GENERAL COUNSELS OFFICE IN WASHINGTON. AS MR DENHM PREVIOUSLY ADVISED MR LEBARON THE PROVISIONS CONTAINED IN PARAGRAPH "C" OF THE PROPOSED CONTRACT BETWEEN THE PRODUCERS AND THE SCREEN ACTORS GUILD ARE APPROPRIATE PROVIDED AS WE ARE INFORMED WAS THE ORAL UNDERSTANDING OF THE PARTIES THE TERM "FIRST EMPLOYMENT" AS USED IN PARAGRAPH "C" IS INTERPRETED TO MEAN FIRST EMPLOYMENT AFTER DATE OF CONTRACT. THIS IS AN INFORMAL OPINION ONLY AND IS NOT TO BE DEEMED AN OFFICIAL INTERPRETATION OR RULING OF THE GENERAL COUNSEL NOR A COMMITMENT WITH RESPECT TO THE

DISPOSITION OF ANY UNFAIR LABOR PRACTICE CHARGES THAT MAY SUBSEQUENTLY BE FILED=
CHARLES K HACKLER ACTING REGIONAL DIRECTOR
NATIONAL LABOR RELATIONS BOARD=

[Later holographic notations and Reporter's stamp omitted in printing]

[Filed Dec. 28, 1995]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

[Title omitted in printing]

DECLARATION OF NAOMI MARQUEZ IN SUPPORT OF HER MOTION FOR SUMMARY JUDGMENT

NAOMI MARQUEZ, pursuant to 28 U.S.C. § 1746, declares:

1. I am the Plaintiff. The facts stated in this declaration are known to me personally.

2. I was never informed by the Screen Actors Guild ("SAG") or Lakeside Productions, Inc. ("Lakeside"), either directly or indirectly, that I had no obligation to SAG as a condition of employment by Lakeside until I had been employed by Lakeside for thirty days.

3. I was never informed by SAG or Lakeside, either directly or indirectly, that my maximum obligation to SAG as a condition of my employment by Lakeside, if I objected to paying the full dues and initiation fee, was the payment of a fee to defray the costs of activities germane to collective bargaining, contract administration, and grievance adjustment.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 20, 1995.

/s/
NAOMI MARQUEZ

[Filed Dec. 28, 1995]

UNITED STATE[S] DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

[Title omitted in printing]

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, Defendant Screen Actors Guild, Inc., hereby move the Court for an order granting summary judgment dismissal of Plaintiff's claim. The motion is based on this notice of motion, the accompanying memorandum of points and authorities, the record submitted herewith and such further evidence as may be presented at the hearing on this motion.

DATED: December 26, 1995

[Signature block and Proof of Service omitted in printing]

[Filed Dec. 28, 1995]

UNITED STATE[S] DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

[Title omitted in printing]

DECLARATION OF VICKI G. SHAPIRO

I, Vicki G. Shapiro, declare as follows:

1. I am the Assistant Hollywood Executive Director of Legal Affairs for the Screen Actors Guild, Inc. ("SAG"). I have been employed as an attorney for SAG for just over 10 years. I have personal knowledge of the matters raised herein and if called as a witness, I would so competently testify.

2. SAG is a labor organization that represents performers in the entertainment industry. SAG currently has over 80,000 members. There are hundreds of employers in the industry and it is not unusual for a single performer to work for numerous employers during any given period of time.

3. In 1994, Defendant Lakeside Productions, Inc. ("Lakeside") became signatory to a collective bargaining agreement with SAG that covered the terms and conditions of employment for performers on Lakeside productions. In particular, Lakeside signed the 1992 Memorandum of Agreement Between Independent Motion Picture and Television Producers and Screen Actors Guild, Inc. (the "Memorandum"). (A true and correct copy of this Memorandum, which has been jointly identified by the parties as Exhibit 24, is attached hereto.) The provisions of the Memorandum are incorporated into the SAG Codified Basic Agreement of 1992 for Independent Producers and the SAG Television Agreement of 1992 for Independent Producers. (These documents shall be referred to herein as the applicable "SAG-Lakeside Agreement.")

4. The SAG-Lakeside Agreement contains a "Union Security" provision that requires that "[e]very performer hereafter employed by

any producer, whether by contract or otherwise, or who acts before the camera, or who makes sound track within the Union's jurisdiction, for any producer, shall be a member of the Union in good standing." (A true and correct copy of this portion of the Agreement, identified by the parties as Exhibit 7, is attached hereto.)

5. For several years now SAG has interpreted and applied the membership in good standing provision set forth above to mean that a performer must pay the equivalent of uniform dues and fees as required under applicable law. Based on this interpretation and application, it is not necessary that a performer become a "member" of SAG in order to be employed under a SAG Agreement. The SAG collective bargaining agreements benefit all performers in the SAG bargaining unit whether they are members or not. Based on my years of experience with SAG, it is well-known in the industry that a performer does not have to be a member of SAG to work on a project governed by a SAG contract.

6. As mentioned above, the Union Security provision requiring payment of dues or fees states that this requirement is not applicable "until on or after the thirtieth day following the beginning of such employment or the effective date of Agreement..."

7. SAG also provides signatory producers with a "Television/Theatrical Production Checklist." (A true and correct copy of this document, identified by the parties as Exhibit 4, is attached hereto.) This checklist is designed to acquaint a signatory with certain obligations contained in the agreements.

8. During the late afternoon of September 7, 1994, I attended a meeting outside my office concerning a SAG legal matter. During this meeting I was advised by telephone by my assistant that a "union security" issue involving Naomi Marquez had arisen. I also reviewed a letter from Hugh Reilly of the National Right to Work Foundation that had been sent to Lakeside. Thereafter, on the following morning September 8, 1994, I wrote to Johanna Persons of Lakeside. My letter stated in part: "Please be advised that Screen Actors Guild has no objection to the employment of Naomi Marquez by Lakeside

Productions, Inc. in "Medicine Ball.'" I had no conversations with Marquez or her agents concerning this matter.

I declare under penalty of perjury that the foregoing is true and correct and that if called as a witness in this proceeding I would so competently testify.

Executed this 22nd day of December, 1995.

/s/
VICKI G. SHAPIRO

[Exhibits omitted in printing]

[Filed Dec. 28, 1995]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

[Title omitted in printing]

DEFENDANT LAKESIDE PRODUCTIONS, INC.'S JOINDER IN DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendant, Lakeside Productions, Inc. hereby joins in Defendant's Motion for Summary Judgment filed herein by defendant Screen Actor's Guild, for the reasons set forth in Section C of the Memorandum in Support of Defendants' Motion for Summary Judgment.

DATED: December 28, 1995

[Signature block omitted in printing]

[Filed Jan. 16, 1996]

UNITED STATE DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

[Title omitted in printing]

DECLARATION OF LEONARD CHASSMAN IN SUPPORT OF OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

I, Leonard Chassman, declare as follows:

1. I am the Hollywood Executive Director of the Screen Actors Guild, Inc. ("SAG"). I have personal knowledge of the matters raised herein and if called as a witness I would so competently testify.

2. The "Union Security" provision in the SAG Codified Basic Agreement for Independent Producers requires that "[e]very performer hereafter employed by any producer shall be a member of [SAG] in good standing."

3. SAG interprets and applies this provision to mean that a performer must pay the equivalent of uniform dues and fees as required under the applicable law. The provision does not mean that every performer must join and be an actual member of SAG. The collective bargaining agreement applies to all performers in the bargaining unit, whether they are members or not.

4. SAG also sends notices to all performers who notify SAG that they decline membership, either by resigning membership or refusing to join in the first instance, of their rights under federal labor law. A true and correct copy of such a notice is attached hereto.

I declare under penalty of perjury that the foregoing is true and correct. Executed this 12th day of January, 1996, at Los Angeles, California.

/s/
LEONARD CHASSMAN

[Attachment:]

December 14,1995

Dear

This is in reply to your letter of resignation from the Screen Actors Guild, which was received on December 2, 1995.

In becoming a dues paying non-member, you have resigned from Guild membership with the intent to perform services for employers signatory to collective bargaining agreements with Screen Actors Guild ("SAG"). Under existing law, you are nevertheless obliged to pay SAG dues to maintain your eligibility for SAG-covered employment. You have the right, however, to object to paying that portion of SAG dues which is allocable to non-representational activities. The current amount chargeable to representational activities by the Guild is 97.2% of Guild dues which you will be required to pay if you become a non-member.

You must advise us whether or not you object to paying that portion of SAG dues which is allocable to non-representational activities. Upon receipt of your response to this question, we will provide you with the financial information as to your dues and advise you as to the procedures to be followed with respect to your decision to work within SAG's jurisdiction as a non-member. Please enclose your current membership card with this correspondence.

Sincerely,

Leonard Chassman
Hollywood Executive Director

cc: Toni Simanovich

[Proof of service omitted in printing]

[Filed Feb. 29, 1996]

UNITED STATE[S] DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

[Title omitted in printing]

CORRECTED SUPPLEMENT TO RECORD IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT OF DEFENDANTS AND IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Defendants Screen Actors Guild Inc. ("SAG") and Lakeside Productions, Inc. ("Lakeside") jointly submit the following in support of their requests for summary judgment and in opposition to Plaintiff's motion for summary judgment in this matter.

As set forth in the previously submitted papers, SAG and Lakeside were parties to the 1992 Independent Motion Picture and Television Producers Agreement. That agreement was submitted in SAG's record in support of its motion for summary judgment. (Exhibit 24, R. 73.) The Independent Producers Agreement, by its terms, expired on June 30, 1995. (Exhibit 24, R. 73.)

While Lakeside has not signed a successor Independent Producers agreement, it has become signatory to the 1995 Memorandum of Agreement between the Alliance of Motion Picture and Television Producers ("AMPTP") and SAG ("Basic Agreement"). The AMPTP is a multi-employer association of entertainment industry employers and SAG is the exclusive representative of the multi-employer bargaining unit.

The 1995 Basic Agreement includes an amendment to the Union Security clause as follows:

> 36. Union Security
>
> Revise the Union Security clause by adding the following sentence at the end of Section 2.A of the Codified Basic Agreement.
>
> "As defined and applied in this section, the term 'member of the Union in good standing' means a person who offers to pay and if the Union accepts the offer, pays) union initiation fees and dues as financial obligations in accordance with the requirements of the National Labor Relations Act."

(A true and correct copy of the pertinent provisions of the 1995 Memorandum of Agreement Between the AMPTP and SAG is attached as Exhibit A to the Declaration of Jesus E. Quinonez, submitted herewith.)

* * * *

In addition, the amendment set forth above has been incorporated into the 1995 Memorandum of Agreement between Independent Motion Picture and Television Producers (non-AMPTP Companies) and SAG. (A true and correct copy of this agreement is attached to the Quinonez Declaration as Exhibit B.)

DATED: February 28, 1996

[Signature block omitted in printing]

[Filed Apr. 17, 1996]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
At Seattle

NAOMI MARQUEZ,
Plaintiff

JUDGMENT IN A CIVIL CASE

v.

SCREEN ACTORS GUILD, et al., Defendants

CASE NUMBER: C94-1831R

☐ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that (1) defendant SAG's motion for summary judgment with respect to Marquez's first cause of action claiming a breach of the duty of fair representation by entering into and maintaining the CBA with Lakeside is GRANTED; (2) defendant SAG's motion for summary judgment as to Marquez's first cause of action claiming a breach of the duty of fair representation by SAG's application of the 30-day grace period provision is GRANTED; (3) defendants SAG and Lakeside's motion for summary judgment with respect to Marquez's second cause of action claiming a breach of the CBA is GRANTED; (4) plaintiff's request to reopen discovery is DENIED.

17 APRIL 1996
Date

BRUCE RIFKIN
Clerk

/s/
(By) Deputy Clerk Elizabeth Tyree

[Filed May 14, 1996]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

[Title omitted in printing]

NOTICE OF APPEAL

Notice is hereby given that Naomi Marquez, Plaintiff in the above named case, hereby appeals to the United States Court of Appeals for the Ninth Circuit from the final Judgment entered in this action on the 17th day of April, 1996.

[Signature block omitted in printing]

DATED: May 13, 1996

[Representation Statement omitted in printing]

[Filed Aug. 29, 1997]

JUDGMENT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 96-35566
CT/AG#: CV-94-01831-BJR

NAOMI MARQUEZ

Plaintiff - Appellant

v.

SCREEN ACTORS GUILD, INC.;
LAKESIDE PRODUCTIONS INC.,
a foreign corporation

Defendants - Appellees

APPEAL FROM the United States District Court for the Western District of Washington (Seattle).

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Western District of Washington (Seattle) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED in part, REVERSED in part, and REMANDED for further proceedings. Each party to pay its own cost.

Filed and entered AUGUST 29, 1997

[Clerk's stamps omitted in printing]

(5)

Supreme Court, U.S.
FILED
MAY 7 1998
CLERK

No. 97-1056

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NAOMI MARQUEZ,

Petitioner,

v.

SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF FOR PETITIONER

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40 pp

QUESTIONS PRESENTED

I. Does a union breach its duty of fair representation when it negotiates and maintains a compulsory unionism provision that, on its face, requires—misleadingly—that an employee be "a member of the Union" and pay the periodic dues and initiation fee "uniformly required as a condition of acquiring membership," even though those requirements cannot lawfully be enforced as a condition of employment?

II. Does the National Labor Relations Board have exclusive jurisdiction over a performer's claim that a union breached its duty of fair representation by negotiating and maintaining a compulsory unionism provision that misleadingly requires payment of dues as a condition of employment after thirty days of "employment as a performer in the motion picture industry"? If the Board does not have exclusive jurisdiction over this claim, did the union breach its duty of fair representation by negotiating and maintaining that provision?

III. Is the employer a necessary party to a suit for breach of the duty of fair representation where an employee seeks reformation or expungement of a collective bargaining agreement provision alleged to be facially invalid?

LIST OF PARTIES

The caption of the case in this Court contains the names of all parties to the proceeding in the court whose judgment is under review. No counsel of record has appeared in this Court for Respondent Lakeside Productions, Inc. ("Lakeside"), which was a defendant in the district court and an appellee in the court of appeals. Lakeside's lead counsel in the proceedings below informed Petitioner's counsel, after the writ of certiorari was granted, that Lakeside did not intend to participate in determining the contents of the Joint Appendix, file a brief, or participate in oral argument in this Court. Consequently, no counsel of record for Lakeside is identified on the cover of the Joint Appendix. However, Lakeside still has a legal interest in the outcome of, and thus is a party to, the proceedings in this Court, because Question III on which certiorari was granted is whether Lakeside is a necessary party to this action.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

No. 97-1056

NAOMI MARQUEZ,
Petitioner,
v.
SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The court of appeals' opinion is officially reported at 124 F.3d 1034 and reprinted in the Appendix to the Petition for Certiorari ("Pet. App.") at page 1a. The unreported opinion of the United States District Court for the Western District of Washington is reprinted in the Petition Appendix at page 22a.

JURISDICTION

The court of appeals entered its judgment on August 29, 1997. (Joint Appendix ("J.A.") at 57.) On November 6, 1997, Justice O'Connor granted Petitioner's timely application for an

extension of time within which to file a petition for certiorari. Justice O'Connor extended the time, as computed under Supreme Court Rule 30.1, to and including December 29, 1997. The Petition for a Writ of Certiorari was timely filed on December 24, 1997. This Court has jurisdiction under 28 U.S.C.A. § 1254(1) (West 1993).

STATUTORY PROVISIONS INVOLVED

This case involves sections 8(a)(3) and 8(b)(2) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. §§ 158(a)(3) and 158(b)(2) (1988). Their pertinent text is set out in the Appendix to the Petition for Certiorari at page 35a.

STATEMENT OF THE CASE

This case involves the construction and application of NLRA section 8(a)(3)'s authorization of compulsory unionism requirements in collective bargaining agreements.

As pertinent here, this is a civil action for breach of the duty of fair representation under section 9(a) of the Act, 29 U.S.C. § 159(a) (1988), an act of Congress regulating commerce. Petitioner Naomi Marquez ("Ms. Marquez"), therefore, contends that the district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337(a) (1988) and section 301 of the Labor Management Relations Act, 1947, 29 U.S.C. § 185 (1988). The district court and court of appeals exercised jurisdiction over some of her unfair representation claims, (*see* Pet. App. at 6a-10a, 13a-19a, 28a-30a), but held that others are subject to the exclusive jurisdiction of the National Labor Relations Board ("Board" or "NLRB"), (*see id.* at 10a-13a, 30a-31a).[1]

[1] The lower courts also dismissed alleged violations of implied terms of the collective bargaining agreement between Respondents. (*See* Pet. App. at 19a-21a, 31a-32a.) Ms. Marquez does not here pursue those claims.

I. The Facts.

Ms. Marquez is a part-time actress. Respondent Lakeside Productions, Inc. ("Lakeside") produced a television series called "Medicine Ball." It is an employer within the meaning of the NLRA, 29 U.S.C. § 152(2) (1988). Respondent Screen Actors Guild, Inc. ("SAG") is a labor organization within the meaning of the NLRA, 29 U.S.C. § 152(5) (1988). It was the exclusive bargaining agent for performers engaged by Lakeside for "Medicine Ball." (Pet. App. at 1a-2a.)

In July 1994, Lakeside and SAG entered into a collective bargaining agreement ("CBA") containing a "union security" provision. (*Id.* at 23a.) That provision required every performer employed by Lakeside to "be a member of the Union in good standing" and "tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union," if they had previously been employed "as a performer in the motion picture industry" (but not necessarily by Lakeside) thirty days or more before beginning employment by Lakeside. (J.A. at 28-29.)[2]

According to SAG's Assistant Hollywood Executive Director of Legal Affairs, (*id.* at 48), SAG knew when it entered into this agreement with Lakeside that it could not lawfully require membership as a condition of employment. SAG also knew that performers had a right under *Communications*

[2] The exact language concerning the payment of dues and initiation fee was that the

> Producer shall not be held to have violated this paragraph if it employs a performer who is not a member of the Union in good standing, . . . if the Producer has reasonable grounds for believing that membership in the Union was denied . . . or . . . terminated for reasons other than the failure of the performer to tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union . . . .

(J.A. at 29.)

Workers v. Beck, 487 U.S. 735 (1988), to pay less than the full dues and initiation fee. (*Id.* at 43-44, 49.)

On August 29, 1994, Ms. Marquez auditioned for a small part in an episode of "Medicine Ball." Lakeside offered her the part, and she accepted. However, Lakeside and SAG also had an agreement that required Lakeside to clear all performers with "Station 12," a department of SAG, as to their compliance with the "union security" provision before employment began. Lakeside's casting director's office, therefore, called Station 12 to clear Ms. Marquez. (Pet. App. at 2a.)

Ms. Marquez was not a SAG member. (*Id.* at 24a.) However, she had worked for another company on a production covered by a SAG agreement for more than a month in 1989. Consequently, Station 12, at the least, informed Lakeside that Ms. Marquez must pay SAG's initiation fee and dues before she could be cleared to work in "Medicine Ball." (*Id.* at 2a-3a.) "The record contains conflicting evidence with regard to whether SAG representatives impermissibly asserted that Marquez was required to 'join' the union before she would be eligible to work or whether the term used was must 'pay' the union." (*Id.* at 14a.)

When she learned that she must pay SAG before she could work, Ms. Marquez called SAG's Seattle office and asked what it cost to join. She was told that the fee was about $500.00. Ms. Marquez then notified her talent agents that she did not have the necessary money. Lakeside would have paid Ms. Marquez $550.00 for doing the part, but not until thirty days after her performance. (*Id.* at 3a.)

Over the next few days, Ms. Marquez's agents tried to solve her problem in several telephone calls to Lakeside, its casting office, and SAG. However, SAG continued to insist that Ms. Marquez pay before being cleared for work and would not permit her to pay after Lakeside paid her for acting in "Medicine

Ball." (*Id.* at 3a-4a.)[3] SAG also never told Ms. Marquez that she had a right under *Beck* to object and pay only that portion of dues and fees that represents collective bargaining costs. (*Id.* at 17a-18a; J.A. at 46.)

Lakeside had scheduled filming of Ms. Marquez's role for September 8, 1994. When she did not pay SAG the demanded dues and initiation fee before its deadline on September 7, Lakeside replaced her with another actress. Lakeside filmed the part as scheduled on the 8th. (Pet. App. at 4a.)

II. Proceedings Below.

Ms. Marquez filed her Complaint against SAG and Lakeside in December 1994. It stated two causes of action: breach of the duty of fair representation and breach of implied terms of the collective bargaining agreement. (J.A. at 9-10.) Only the first claim is relevant to this Petition.

Ms. Marquez's first claim for relief is that SAG breached the duty of fair representation it owed her by negotiating and enforcing the compulsory unionism provision of its collective bargaining agreement with Lakeside. She alleges that SAG breached that duty because that provision, on its face and as applied, (a) required union membership, (b) did not provide a thirty-day "grace period" after employment by Lakeside before any obligations to SAG arose, and (c) did not limit an employee's obligation to payment of a fee to defray SAG's costs of collective bargaining, contract administration, and grievance adjustment. (*Id.* at 9-10.) This claim also alleges that SAG violated its duty of fair representation by failing to advise Ms. Marquez truthfully of her rights and obligations under the NLRA, including her rights under *Beck*. (*Id.* at 10.)

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[3] After SAG learned that Ms. Marquez had obtained legal counsel, SAG faxed a letter to Lakeside saying that it did not object to her working. However, this letter arrived after Lakeside had already replaced Ms. Marquez. (Pet. App. at 3a-4a.)

The parties filed cross-motions for summary judgment. (*Id.* at 21-25, 47, 50.) The district court granted Defendants' motion on all claims, and denied Ms. Marquez's. It ruled that SAG did not breach the duty of fair representation by negotiating and enforcing the requirements of full "membership" and payment of full dues. (Pet. App. at 28a-30a.) The court held that Ms. Marquez's unfair representation claims concerning the employment-in-the-industry provision are "preempted by the exclusive jurisdiction of the National Labor Relations Board." (*Id.* at 30a-31a.) The court also rejected the breach of contract claims. (*Id.* at 31a-32a.)

Ms. Marquez timely appealed. (J.A. at 56.) The court of appeals reversed the summary judgment as to her claims that SAG's enforcement of the compulsory unionism provision breached the duty of fair representation. The court found genuine issues of fact material to those claims. It also reversed because the district court failed both to address Ms. Marquez's allegation that SAG's failure to notify her of her *Beck* rights breached the duty and to analyze the enforcement claims "under the arbitrariness standard of *Vaca*" *v. Sipes*, 386 U.S. 171 (1967). The court of appeals remanded the case for resolution of those claims. (Pet. App. at 13a-19a.)

However, the court of appeals affirmed "the district court's conclusion that SAG did not breach its duty of fair representation by negotiating a CBA which requires covered actors to be members of the union in good standing." (*Id.* at 6a-10a.)

The court acknowledged that, under this Court's decisions in *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963), and *Beck*, "unions can require no more than payment of initiation fees and dues covering a 'financial core' of services provided to all employees . . . limited to expenditures germane to 'collective bargaining, contract administration, and grievance adjustment.'" (Pet. App. at 7a (quoting *Beck*, 487 U.S. at 745).) Nonetheless, the court followed decisions of two other circuits that "held that terms requiring union 'membership' continue to be permissible under federal law." (*Id.* at 8a (citing *Electronic Workers v.*

NLRB, 41 F.3d 1532 (D.C. Cir. 1994), and *Nielsen v. Machinists Local 2569*, 94 F.3d 1107 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1426 (1997).) The court recognized that its decision on this issue conflicts with *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994), citing *Bloom* as contrary to *Electronic Workers* and *Nielsen*. (Pet. App. at 8a.)

In considering Ms. Marquez's claim that the employment-in-the-industry provision on its face breached the duty of fair representation, the court of appeals conceded that "[d]iscerning a principled distinction between a disguised unfair labor practices claim and a straightforward breach of duty claim is no simple matter." (*Id.* at 12a.) However, the court nevertheless affirmed "the district court's conclusion that Marquez's challenge to the CBA's 30 day term is preempted by the NLRB's exclusive jurisdiction." (*Id.* at 10a-13a.)

Finally, in the portion of its opinion "affirm[ing] the district court's dismissal of the breach of contract claim," (*id.* at 19a-21a), the court of appeals rejected Ms. Marquez's contention that "Lakeside is implicated in SAG's alleged failures in fairly representing her" and is "a necessary party to obtain full relief through contract reformation." (*Id.* at 20a.)

SUMMARY OF ARGUMENT

Question I: In *Communications Workers v. Beck*, this Court established that a union breaches the duty of fair representation if, in negotiating or enforcing a compulsory unionism agreement, it requires more of employees than NLRA section 8(a)(3), as construed by the Court, permits. Even before *Beck*, the Court had long held that union membership cannot be a requirement of employment under section 8(a)(3), despite that section's use of the term "membership." And, in *Beck*, the Court held that section 8(a)(3) does not allow a union to require payment of more than a prorated share of its collective bargaining costs.

Consequently, a union breaches the duty of fair representation if, as SAG did here, it negotiates and maintains a "union

security" provision that purports to require full union membership and full union dues. Negotiation of such an agreement is arbitrary conduct, because it is wholly irrational to negotiate an agreement that cannot be enforced as written, is plainly contrary to the Act's policy of voluntary unionism, and requires employees to consult extraneous sources to discover their true rights and obligations. Negotiation of such a provision is also *per se* bad faith conduct, because "the ***only*** realistic explanation for the retention of the statutory language in collective bargaining agreements . . . is to mislead employees about their right not to join the union." *Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986, 990 (7th Cir. 1997) (opinion by Posner, C.J.) (emphasis added).

Question II: The "union security" provision here also purported to require membership in SAG after thirty days of employment "as a performer in the motion picture industry." That requirement violates section 8(a)(3)'s first proviso, which guarantees employees a ***separate*** thirty-day grace period with each employment before they can be forced to comply with a compulsory unionism agreement.

The NLRB's exclusive jurisdiction over unfair labor practice charges never preempts a federal court's jurisdiction over an unfair representation claim. Therefore, because the negotiation of a compulsory unionism agreement that misrepresents employees' obligations breaches the duty of fair representation under *Beck*, Ms. Marquez's claims regarding the employment-in-the-industry clause are not preempted. The court of appeals properly exercised jurisdiction over her claims that the union breached the duty of fair representation by negotiating a provision that misrepresents the extent of employees' obligations and by statements outside the bargaining agreement misrepresenting when Ms. Marquez's obligations began. No principled basis exists for distinguishing those claims from the claim that the union also breached the same duty by its misrepresentations in the agreement about when Ms. Marquez's obligations began.

Question III: The appropriate remedy for both breaches of the duty of fair representation that inhere in the compulsory unionism provision here includes reformation of the contract to expunge those portions of the provision that misleadingly overstate employees' obligations. Therefore, as in any other case, including a suit for breach of the duty of fair representation, in which reformation of a contract is sought, both parties to the agreement are necessary parties to the action. The employer should not have been dismissed from this case.

ARGUMENT

I. A Union Breaches Its Duty of Fair Representation When It Negotiates and Maintains a Compulsory Unionism Provision That Falsely Requires Full Membership and Payment of Full Union Dues as a Condition of Employment, Although Those "Requirements" Cannot Lawfully Be Enforced.

To deal with the danger that unions might abuse the statutory privilege of exclusive representation, this Court has interpreted the federal labor statutes as imposing a duty of fair representation upon bargaining agents. The Court first found the duty under section 2, Fourth of the Railway Labor Act, 45 U.S.C. § 152, Fourth (1988), in *Steele v. Louisville & Nashville Railroad*, 323 U.S. 192 (1944). It later applied the same duty under section 9(a) of the NLRA, 29 U.S.C. § 159(a) (1988), in *Ford Motor Co. v. Huffman* because of the two labor statutes' "comparable provisions" for exclusive representation. 345 U.S. 330, 337 (1953).

The duty of fair representation is "akin to the duty owed by other fiduciaries to their beneficiaries." *Air Line Pilots v. O'Neill*, 499 U.S. 65, 74 (1991). That duty "require[s] the union, in collective bargaining and in making contracts with the [employer], to represent non-union or minority union members of the [bargaining unit] without hostile discrimination, fairly,

impartially, and in good faith." *Steele*, 323 U.S. at 204.[4] In general, "a union breaches its duty of fair representation if its actions are either 'arbitrary, discriminatory, or in bad faith.'" *O'Neill*, 499 U.S. at 67 (quoting *Vaca v. Sipes*, 386 U.S. 171, 190 (1967)).

A union's duty of fair representation generally includes an obligation to give nonmembers notice of proposed union action that could result in their discharge. *See Steele*, 323 U.S. at 204. In the specific context of a compulsory unionism provision, the "obligation of fair dealing . . . includes the duty to inform the employee of his ***rights*** and obligations so that the employee may take all necessary steps to protect his job." *Electrical Workers Local 801 v. NLRB*, 307 F.2d 679, 683 (D.C. Cir.) (opinion by Burger, J.) (emphasis added), *cert. denied*, 371 U.S. 936 (1962); *cf. Teachers Local 1 v. Hudson*, 475 U.S. 292, 306 (1986) ("[b]asic considerations of fairness . . . dictate" that a union give employees "sufficient information to gauge the propriety of the union's fee" so that they may decide whether to object to paying for nonbargaining activities).

Abrams v. Communications Workers identified the necessary criterion for determining whether a union breaches its fiduciary duty in negotiating or enforcing a union or agency shop agreement: "A union's fair representation duty in the context of a mandatory agency fee hinges on its compliance with section 8(a)(3) of the NLRA." 59 F.3d 1373, 1377 (D.C. Cir. 1995).[5] This holding follows logically from the obvious fact that,

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[4] "The parties do not dispute that the duty of fair representation extends to Marquez, a job applicant." (Pet. App. at 28a n.2.) *See NLRB v. Town & Country Elec., Inc.*, 116 S. Ct. 450, 452 (1995); *Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 87-90 (1989).

[5] The "term 'agency shop' applies to an arrangement under which all employees are required as a condition of employment to pay dues to the union and pay the union's initiation fee, but they need not actually become (continued...)

in negotiating and enforcing a compulsory unionism agreement, a union acts in its own interest and against the interests of employees who are not voluntary members.

Thus, if an exclusive representative attempts to require more of employees than section 8(a)(3) allows in negotiating or enforcing a compulsory unionism agreement, it acts arbitrarily. "Viewed in light of the legal landscape," such conduct "can be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly 'irrational' or 'arbitrary,'" *O'Neill*, 499 U.S. at 78-79 (quoting *Huffman*, 345 U.S. at 338) (citation omitted).

This proposition necessarily follows from *Communications Workers v. Beck*, 487 U.S. 735 (1988). *Beck* decided a claim by nonmembers that a union "failed to represent their interests fairly and without hostility by negotiating and enforcing an agreement that allows the exaction of funds for purposes" unrelated to collective bargaining. *Id.* at 743. *Beck* determined that claim of unfair representation in the employees' favor, holding that section 8(a)(3) "authoriz[es] the collection of only those fees necessary to finance collective-bargaining activities," *id.* at 759. *See id.* at 744-63.[6]

Yet, *Beck* did not even discuss whether the union there acted in bad faith. Since bad faith depends upon the particular facts of

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[5] (...continued)
union members." *NLRB v. General Motors Corp.*, 373 U.S. 734, 736 (1963). However, under "§ 8(a)(3), the only aspect of union membership that can be required pursuant to a union shop agreement is the payment of dues." *Pattern Makers v. NLRB*, 473 U.S. 95, 106 n.16 (1985). Thus, a "union shop" is the "practical equivalent" of an "agency shop." *General Motors*, 373 U.S. at 743.

[6] *See also Beck*, 487 U.S. at 742-44, 761-62 (holding that the courts had jurisdiction to decide the nonmembers' unfair representation and constitutional claims, and finding it unnecessary to address the latter).

a case, *Beck* must implicitly have concluded that negotiation or enforcement of a compulsory unionism provision exceeding the limits of section 8(a)(3) is *per se* arbitrary conduct.

Moreover, if the requirement imposed is clearly unlawful on the face of section 8(a)(3) or under authoritative preexisting case law, then the union's conduct is both arbitrary ***and*** in bad faith. As bargaining representative, the union—a "fiduciary"—has a duty to know the law that governs its conduct in that capacity.

The duty of fair representation "applies to all union activity, including contract negotiation." *O'Neill*, 499 U.S. at 67; *see Beck*, 487 U.S. at 743. Here, SAG breached the duty by negotiating and maintaining a collective bargaining agreement with Lakeside containing a "union security" provision that on its face purported to require full union membership and payment of full dues and initiation fee, because section 8(a)(3), as authoritatively interpreted by this Court, prohibits both requirements. That the language of the agreement tracks the literal language of the statute does not avoid the breach. As a fiduciary, the "union may not treat as adversaries" the employees it represents, but has a duty to specify their true obligations in language they can understand. *See Electrical Workers Local 801*, 307 F.2d at 683.

A. Because This Court Has Held Full Membership Requirements Unlawful Since 1954, the Only Possible Purpose of Agreements Stating That Membership Is Required Is to Mislead Employees.

Section 8(a)(3) forbids "discrimination [by an employer] in regard to hire or tenure of employment . . . to encourage . . . membership in any labor organization." 29 U.S.C. § 158(a)(3). But for two provisos to the section, "all union-security clauses would fall within this otherwise broad condemnation." *Beck*, 487 U.S. at 744.

Section 8(a)(3)'s first proviso permits an employer to make "an agreement with a labor organization . . . to require as a condition of employment membership therein." 29 U.S.C.

§ 8(a)(3), 1st proviso. However, the second proviso limits the first. It provides that an employer may not discriminate against an employee for nonmembership in a union "if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure . . . to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(a)(3), 2d proviso, pt. (B).

Since 1954, it has been clear from this Court's decisions that, under the latter proviso, "union security agreements cannot be used for 'any purpose other than to compel payment of union dues and fees.'" *Pattern Makers v. NLRB*, 473 U.S. 95, 106 n.16 (1985) (quoting *Radio Officers v. NLRB*, 347 U.S. 17, 41 (1954)). "Under the second proviso to § 8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963) (citing *Radio Officers*). In short, at least since 1954, "[f]ull union membership . . . no longer can be a requirement of employment." A congressional "policy of voluntary unionism" is "implicit in § 8(a)(3)." *Pattern Makers*, 473 U.S. at 104-06.

Consequently, a bargaining agreement that requires all employees, as a condition of employment, to "be full-fledged Union members" "assert[s] the existence of a non-existent and non-permissible requirement." *Service Employees Local 680 v. NLRB*, 601 F.2d 980, 981-82 (9th Cir. 1979). SAG had known for "several years" that it could not require an employee to be a member "in good standing." (J.A. at 49, ¶ 5; *id.* at 43.) Yet, the first sentence of the provision that SAG entered into with Lakeside in July 1994 purported to require precisely that: "Every performer . . . shall be ***a member of the Union*** in good standing." (*Id.* at 28 (emphasis added).)

Such a clause is unlawful on its face, as the Sixth and Eighth Circuits have held. *Buzenius v. NLRB*, 124 F.3d 788, 791-93 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3427 (U.S. Dec. 8, 1997) (No. 97-945); *Bloom v. NLRB*, 30 F.3d

1001, 1003-05 (8th Cir. 1994); *accord Schreier v. Beverly Cal. Corp.*, 892 F. Supp. 225, 226-27 (D. Minn. 1995). "To permit the CBA to say what it cannot literally mean does violence both to the Act's policy of voluntary unionism and to principles of contract interpretation." *Buzenius*, 124 F.3d at 792.

First, a compulsory unionism provision requiring "membership in good standing" or "membership" "is inconsistent with the Act's policy of voluntary unionism because it misleads employees into believing that they may not exercise free choice in the matter of union membership." *Id.* at 792-93. An "employee who is unfamiliar with the Supreme Court cases discussing union security provisions is likely to conclude that the clause requires exactly what it says." *Bloom*, 30 F.3d at 1005.[7]

Second, a compulsory unionism provision requiring "membership in good standing" or "membership" "turns normal contract interpretation on its head." "[E]mployees must consult extraneous sources and subsequent notices in order to discover that they have a right not to do what the plain language of the clause requires." *Buzenius*, 124 F.3d at 793.

Notice of employees' true rights from extraneous sources or separate notices is insufficient, because "the union-security

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[7] As the NLRB's current Chairman has recognized, "even today, many workers and employers do not understand that 'membership' is what the Supreme Court has defined it to be in its 1963 *General Motors* holding." *Group Health, Inc.*, 325 N.L.R.B. No. 49, slip op. at 5 (Jan. 30, 1998) (Gould, Chairman, concurring), *petition for review pending*, No. 97-1582 (8th Cir.); *see Electronic Workers Local 444*, 311 N.L.R.B. 1031, 1040 (1993), *rev'd in part on cross-petitions for review & enforcement*, 41 F.3d 1532 (D.C. Cir. 1994); Dan C. Heldman et al., *Deregulating Labor Relations* 69 (1981); Thomas R. Haggard, *Compulsory Unionism, the NLRB, and the Courts* 70 (U. Pa. Wharton Sch. Indus. Res. Unit Lab. Rel. & Pub. Pol'y Series Report No. 15, 1977); Norman L. Cantor, *Uses and Abuses of the Agency Shop*, 59 Notre Dame L. Rev. 61, 61 n.2 (1983); Harry H. Wellington, *Union Fines and Workers' Rights*, 85 Yale L.J. 1022, 1057-58 (1976).

clause, which cannot mean what it says and cannot be applied as drafted, remains in the CBA, the on-going contract by which the employees' relationship to the employer is governed." *Id*; *see Bloom*, 30 F.3d at 1005. A separate notice "is not adequate where the collective-bargaining agreement sends a contrary message and instruction to employees within the bargaining unit." *Monson Trucking, Inc.*, 324 N.L.R.B. No. 149, slip op. at 8 (Oct. 31, 1997) (Gould, Chairman, concurring).

Thus, negotiation of a provision that requires full union membership is *per se* arbitrary and breaches the duty of fair representation, no matter whether the union enforces it as written. It is clearly irrational to negotiate a clause that "assert[s] the existence of a non-existent and non-permissible requirement," *Service Employees Local 680*, 601 F.2d at 982.

Moreover, negotiation of such a clause is also *per se* bad faith conduct, because "the only realistic explanation for the retention of the statutory [membership] language in collective bargaining agreements . . . is to mislead employees about their right not to join the union." *Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986, 990 (7th Cir. 1997) (opinion by Posner, C.J.); *accord Buzenius*, 124 F.3d at 793; *see Bloom*, 30 F.3d at 1004. A "union owes employees a duty to represent them . . . ***honestly*** and in good faith." *O'Neill*, 499 U.S. at 75 (emphasis added). A union, like SAG, that negotiates and maintains an agreement falsely stating that "membership" is necessary, when it knows it cannot enforce that requirement, has not represented employees honestly.

B. Agreements Defining "Membership" as the Payment of Full Union Dues Misleadingly Suggest That Payment Makes Employees Full Members and That Full Dues Must Be Paid, Contrary to This Court's Decision in *Communications Workers v. Beck*.

Besides requiring membership "in good standing," the "union security" provision here said, in subsection B, that the

> Producer shall not be held to have violated this paragraph if it employs a performer who is not a member of the Union in good standing, . . . if the Producer has reasonable grounds for believing that membership in the Union was denied . . . or . . . was terminated for reasons other than the failure of the performer to tender ***the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union*** . . . .

(J.A. at 29 (emphasis added).)

This convoluted clause "cannot cure the defect of the opening sentence" of the compulsory unionism provision. "[H]aving misinformed employees of their obligations in the first sentence, [the union cannot] adequately remedy the unlawful effect in the 'fine print.'" *Group Health, Inc.*, 325 N.L.R.B. No. 49, slip op. at 8 (Jan. 30, 1998) (Brame, Member, dissenting), *petition for review pending*, No. 97-1582 (8th Cir.). Moreover, subsection B, too, is unlawfully misleading on its face, for two reasons.

First, this language does not clarify that a performer need ***not*** be a member ***at all***. "Nowhere does the clause inform, or even suggest to employees, that they may choose to be *nonmembers*." Instead, it suggests that payment of dues and the initiation fee ***makes*** a performer a member. *See id.*[8] The court in *Schreier*

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[8] Respondents' current agreement suffers from the same defect. The "union security" clause has been amended, but it still requires a performer to "be a member of the Union in good standing," defined as "a person who offers to pay (and, if the Union accepts the offer, pays) union initiation fees and dues as financial obligations in accordance with the requirements of the National Labor Relations Act." (J.A. at 28, 53-54.) Thus, employees are still likely to be misled into believing that they must (continued...)

held the agreement there facially invalid despite similar language. That agreement defined membership "'in good standing'" as "'payment of a standard initiation fee and standard regular monthly dues.'" 892 F. Supp. at 226-27; *see also Wegscheid*, 117 F.3d at 990 ("retention of the statutory language in collective bargaining agreements . . . [will] mislead employees about their right not to join the union").

Second, that the agreement here required "the performer to tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership," (J.A. at 29), means that on its face it purported to require payment of more than section 8(a)(3) permits under *Beck*. SAG therefore breached the duty of fair representation in that respect as well.

In *Bloom*, the Eighth Circuit reversed a NLRB-approved settlement agreement requiring a union and employer

> to post notices informing employees that they would "no longer give effect to the provision in [the] contract . . . that requires employees become and remain 'members in good standing' as a condition of continued employment unless such provision also provides that employees need only pay the Union's periodic dues and initiation fees."

30 F.3d at 1002, 1004 (alteration in original). This notice was "not sufficient to protect [the] employees' . . . right to refrain from union activities," because, under *Beck*, employees "cannot be obligated as a condition of their employment to pay *all* union dues and initiation fees, as the above notice seems to imply." *Id.*

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[8] (...continued)
be members and pay full fees and dues, because the clause does not mention the options of being a nonmember and paying only collective bargaining costs (options the union ***must*** "accept" if chosen by employees).

at 1004-05. The court held that "an adequate remedy . . . requires expunction of the offending clause." *Id.* at 1005.

Similarly, in *Schreier*, a suit for breach of the duty of fair representation, the agreement required "'payment of a standard initiation fee and standard regular monthly dues.'" 892 F. Supp. at 226-27. The court held that the "union security clause is facially invalid under section 8 of the [NLRA] because it requires more from the plaintiff than can be required under the *Beck* and the *Bloom* cases." *Id.* at 226 (citation omitted). The court concluded, "[a]s was done in *Bloom*, therefore, the judgment must expunge the unlawful provision in the collective bargaining agreement." *Id.* at 227. *See also Buzenius*, 124 F.3d at 793 (the NLRB abused its discretion in refusing to order that a compulsory unionism clause be either removed from the collective bargaining agreement or modified to explain that employees have a "right to refuse to join the Union or pay full dues, so long as they pay that portion of dues related to core representational activities").

At the least, a union acts arbitrarily in negotiating a compulsory unionism provision that is facially invalid under this Court's authoritative case law interpreting section 8(a)(3). *See supra* pp. 9-12. *Beck* controls on this issue, and SAG was aware of its holding "[p]rior to the events which gave rise to this lawsuit." (J.A. at 43-44.) Therefore, SAG breached its duty of fair representation by, six years after *Beck*, negotiating a provision that on its face misleadingly "asserted the existence of a [second] non-existent and non-permissible requirement," *Service Employees Local 680*, 601 F.2d at 982, *i.e.*, payment of full union dues and initiation fee. As with the term "membership," "the only realistic explanation for the retention of the statutory language in collective bargaining agreements . . . is to mislead employees about their right not to join the union" and not to "pay the full union dues." *Wegscheid*, 117 F.3d at 990.

C. Those Lower Court Decisions Permitting Misleading Compulsory Unionism Provisions Are Irrational and Misapplied This Court's *Beck* Decision.

The court of appeals engaged in no independent analysis in ruling that the "union security" provision in SAG's agreement with Lakeside did not breach the duty of fair representation. It merely relied on *Electronic Workers v. NLRB*, 41 F.3d 1532 (D.C. Cir. 1994), and *Nielsen v. Machinists Local 2569*, 94 F.3d 1107 (7th Cir. 1996), *cert. denied*, 117 S. Ct. 1426 (1997). (*See* Pet. App. at 8a-10a). Like the court of appeals' decision, those earlier decisions are wrong.[9]

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[9] In *Wegscheid*, another panel of the Seventh Circuit indicated that it would have reached a result contrary to *Nielsen* in an appropriate case. *Wegscheid* was an employees' suit alleging that their exclusive bargaining agent breached the duty of fair representation by negotiating and enforcing a compulsory unionism provision that did "not advise the employees of their right (announced in *Beck*) not to join the union and instead to pay only an agency fee." 117 F.3d at 988. The court held that the facial challenge to the provision was "moot," because a settlement of the enforcement count of the complaint gave the plaintiffs "all the relief that *they* need to protect themselves against being misled" by "the objectionable language in the collective bargaining agreement." *Id.* at 990.

However, the *Wegscheid* court also "emphasize[d]," inconsistently with *Nielsen*, that:

> nothing we have said has been intended to suggest that unions and employers have a privilege to incorporate the language of section 8(a)(3) of the NLRA into their collective bargaining agreements if the consequence is to mislead the employees. This language does not mean what it says, and if its inclusion without appropriate qualification misleads employees, either ***by itself*** or in conjunction with other misleading representations, the union cannot hide behind the fact that it is, after all, the words of Congress that it is repeating.

117 F.3d at 991 (emphasis added).

When the "plain meaning" of the words of a statute would lead "to absurd or futile results," or "merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole,' this Court has followed that purpose, rather than the literal words." *United States v. American Trucking Ass'ns*, 310 U.S. 534, 543 (1940) (quoting *Ozawa v. United States*, 260 U.S. 178, 194 (1922)); *accord Perry v. Commerce Loan Co.*, 383 U.S. 392, 399-400 (1966). It is irrational to hold, as *Electronic Workers*, *Nielsen*, and the Ninth Circuit here did, that Congress authorized unions and employers to couch compulsory unionism agreements in language the literal enforcement of which it prohibited. Such an interpretation of section 8(a)(3) also is plainly contrary to the Act's "policy of voluntary unionism" that is "implicit in § 8(a)(3)," *Pattern Makers v. NLRB*, 473 U.S. 95, 104-06 (1985). *See Buzenius*, 124 F.3d at 792-93.

Moreover, *Electronic Workers* and *Nielsen*—and thus the court of appeals here—misread *Beck*. *Beck* does not speak "only to the level of dues an employee may lawfully be required to pay under a union-security agreement," *Electronic Workers*, 41 F.3d at 1539; *accord Nielsen*, 94 F.3d at 1114-15. To the contrary, as the Second Circuit said in *dicta* in *Price v. Auto Workers Local 571*, in *Beck* "***bargaining for and entering into agreements*** which call for payments to support Union activities beyond those germane to collective bargaining ***were found to be violative of the Union's duty of fair representation***." 927 F.2d 88, 91 (2d Cir.) (emphasis added), *cert. denied*, 502 U.S. 905 (1991).

The Second Circuit accurately described *Beck*'s holding. *Beck* "delineated the precise limits § 8(a)(3) places on the ***negotiation*** and enforcement of union-security agreements." 487 U.S. at 745 (emphasis added). The Court granted certiorari in *Beck* "to resolve the important question concerning the ***validity of such agreements***." *Id.* at 741-42 (emphasis added). Significantly, one of section 8(a)(3)'s limits "on the ***negotiation*** . . . of union-security agreements" *Beck* acknowledged is that "the 'membership' that may be . . . required has been 'whittled down to its financial core.'" *Id.* at 745 (emphasis added) (quoting *General Motors*, 373 U.S. at 742). Moreover, *Beck* decided a

"claim that the union failed to represent [nonmembers'] interests fairly and without hostility by ***negotiating*** and enforcing an agreement that allows the exaction of funds for purposes that do not serve their interests and in some cases are contrary to their personal beliefs." *Id.* at 743 (emphasis added).

Thus, *Buzenius*, *Bloom*, and *Schreier* were correctly decided; and *Electronic Workers*, *Nielsen*, and the case here below were not.[10] SAG acted arbitrarily and in bad faith by

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[10] *Electronic Workers* also is distinguishable. *Electronic Workers* held that the union there did not act in bad faith by maintaining a union-shop clause that conformed to the "model clause" approved in *Keystone Coat, Apron & Towel Supply Co.*, 121 N.L.R.B. 880, 885 (1958). 41 F.3d at 1537-38. That "model clause" used the phrase "members in good standing." The court reasoned that the union could not have acted in bad faith, because the Board did not overrule *Keystone Coat* until *Electronic Workers*. *See* 41 F.3d at 1536, 1538.

SAG has no similar defense. In *Electronic Workers*, the court conceded that the NLRB was "free to reconsider its *Keystone Coat* policy in light of evolving Supreme Court precedent and to conclude that, in the future, unions will be found guilty of a duty-of-fair-representation violation if they adopt 'ambiguous' union-security provisions . . . without apprising employees of their rights under such provisions." *Id.* at 1538. That reconsideration occurred on May 28, 1993, when the NLRB, relying on *Beck*, explicitly overruled *Keystone Coat*'s model clause. *Electronic Workers Local 444*, 311 N.L.R.B. 1031, 1041 (1993), *rev'd in part on cross-petitions for review & enforcement*, 41 F.3d 1532 (D.C. Cir. 1994).

SAG did not enter into its collective bargaining agreement with Lakeside until July 1994. (Pet. App. at 23a.) By then, SAG had more than a year's notice from the Board's decision in *Electronic Workers* that it might breach its duty of fair representation by including the provision requiring membership in good standing. The D.C. Circuit's later decision in *Electronic Workers* is irrelevant, because that decision reversed only the Board's "retroactive application" of its new policy. *See* 41 F.3d at 1538; (*see also* Pet. App. at 9a (*Electronic Workers* held "that there was no showing of a bad faith breach of the duty of fair representation . . . because identical

(continued...)

negotiating a full membership requirement with Lakeside that was facially invalid under section 8(a)(3) as construed consistently by this Court since *Radio Officers* in 1954, and a full dues and fees requirement that was facially invalid under that section as authoritatively interpreted by the Court in *Beck* in 1988. Ms. Marquez, not SAG, was entitled to summary judgment on her claim that SAG breached the duty of fair representation by negotiating and maintaining an agreement that on its face misleadingly purported to require full membership and payment of the full dues and initiation fee required of a union member.

II. Ms. Marquez's Claim That SAG's Negotiation of the Misleading "Employment in the Industry" Requirement Breached the Duty of Fair Representation Is No Exception to the Federal Courts' Concurrent Jurisdiction Over Unfair Representation Claims.

The first proviso to NLRA section 8(a)(3) permits only compulsory unionism clauses in which "***an employer*** . . . require[s] as a condition of employment membership . . . on or after the thirtieth day following the beginning of ***such*** employment." 29 U.S.C. § 158(a)(3), 1st proviso (emphasis added). Consequently, employees have a statutory, thirty-day grace period with every employment relationship.

An employee "'*who has become delinquent in dues under a contract covering one bargaining unit cannot be denied employment under a contract covering another bargaining unit* without affording him the statutory grace period in which to become current in his or her dues.'" *NLRB v. Iron Workers Local 433*, 767 F.2d 1438, 1442 (9th Cir. 1985) (quoting *Iron Workers Local 118*, 257 N.L.R.B. 564, 566 (1981), *enforced per curiam*, 720 F.2d 1031 (9th Cir. 1983)). Moreover, an employee has a right to a new grace period when an employer rehires him

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[10] (...continued)
union security provisions had never ***previously*** been found to be 'ambiguous' or misleading") (emphasis added)).

or her unless the employee was delinquent in dues when previously employed by that employer. *Carpenters Local 740*, 238 N.L.R.B. 159, 160-61 (1978).

The agreement between SAG and Lakeside required "as a condition of employment [by Lakeside] membership in the Union . . . thirty (30) days after [a person's] first employment as a performer ***in the motion picture industry***." (J.A. at 28-29 (emphasis added).) Thus, the agreement misrepresented employees' obligations, denying them the separate thirty-day grace period with each employment that is their statutory right, unless they were delinquent in their dues obligations in a prior employment with the same employer.

The Board held a similar clause facially invalid in *Theatrical Stage Employees Local 644*, 259 N.L.R.B. 1415 (1982). That clause required all cameramen employed by a producer to join the union "'not later than the 31st day following the beginning of their first employment,'" defined as "'the first such employment for producers under contract with Local 644.'" *Id.* at 1418. The NLRB held that the clause "clearly contravenes the statutory intent of Section 8(a)(3) of the Act," because it does "not provide for the statutory 30-day waiting period before requiring union membership." *Id.* at 1416, 1422. With "respect to any employee who . . . has completed 31 days of employment with any employer subject to its provisions, the provision constitutes a[n unlawful] closed shop and a bar to employment unless that employee continues to remain a member of the Union in good standing." *Id.* at 1422.

The agreement here says that the employment-in-the-industry clause "has been approved by an advisory opinion of the General Counsel of the [NLRB]." (J.A. at 31.) However, no procedure exists for obtaining "advisory opinions" from the NLRB concerning the validity of collective-bargaining provisions. The so-called "advisory opinion" is "an informal opinion only," expressed in 1948 by an Acting Regional Director's telegram. Moreover, that telegram said it "is not to be deemed an official interpretation or ruling of the General Counsel nor a

commitment with respect to the disposition of any unfair labor practice charges that may subsequently be filed." (*Id.* at 45-46 (capitalization altered).) After the NLRB's later contrary holding in *Theatrical Stage Employees Local 644*, SAG's reliance on that equivocal, informal opinion was, at the least, arbitrary.

Ms. Marquez's Complaint alleges that SAG breached its duty of fair representation by negotiating a compulsory unionism provision that did not provide a thirty-day grace period after employment by Lakeside before any obligations to the union arose. (J.A. at 9-10.) The court of appeals held that this claim "is preempted by the NLRB's exclusive jurisdiction" over arguable unfair labor practice claims. (Pet. App. at 10a-13a.) Yet, simultaneously, by deciding it, the court of appeals recognized that the district court had jurisdiction over Ms. Marquez's parallel claim that SAG breached the duty of fair representation by negotiating a compulsory unionism provision that "requires covered actors to be members of the union in good standing." (*See id.* at 6a-10a.)

The court of appeals correctly exercised jurisdiction over the latter claim, because the duty of fair representation "applies to all union activity, including contract negotiation," *Air Line Pilots v. O'Neill*, 499 U.S. 65, 67 (1991); *see Beck*, 487 U.S. at 743. There are no exceptions to the rule that NLRB preemption "does not extend to suits alleging a breach of the duty of fair representation." *See Breininger v. Sheet Metal Workers Local 6*, 493 U.S. 67, 74-78 (1989).

Specifically, this Court in *Beck* held that the federal courts have jurisdiction over a claim that a union breached the duty of fair representation by negotiating and enforcing a compulsory unionism provision that required employees to pay full union dues in violation of section 8(a)(3)'s prohibition on "the exaction of fees beyond those necessary to finance collective-bargaining activities." *See* 487 U.S. at 742-44. That claim was not within the NLRB's exclusive jurisdiction, although the unions' conduct in *Beck* was both an unfair labor practice under section 8(b)(2) of the NLRA, 29 U.S.C. § 158(b)(2) (1988), and a breach of the

duty of fair representation. *See Beck*, 487 U.S. at 745 & n.2; *Abrams v. Communications Workers*, 59 F.3d 1373, 1377 & n.3 (D.C. Cir. 1995). Therefore, that SAG's "employment in the industry" clause also violates sections 8(a)(3) and 8(b)(2) does not establish that Ms. Marquez's claims regarding that clause are not judicially cognizable claims of unfair representation.

No principled basis exists for distinguishing the claim the court of appeals adjudicated—that a union breached the duty of fair representation by negotiating a provision that on its face allegedly misleads employees about the ***extent*** of their lawful obligations to the union—from the claim it held to be pre-empted—that a union breached the same duty by negotiating another provision of the same agreement that allegedly misinforms employees about ***when*** those obligations lawfully begin. *Cf. Abrams*, 59 F.3d at 1380-81 (holding that a union would violate the duty of fair representation if it collected full agency fees before new hires received notice of their right to pay only the *Beck* amount). The court of appeals' decision, thus, is internally inconsistent and contrary to *Beck*.

Moreover, the court of appeals' decision on this issue is internally inconsistent and contrary to *Beck* in another respect. The court also acknowledged jurisdiction over Ms. Marquez's claims that SAG's statements outside the collective bargaining agreement breached the duty of fair representation by misleading her about ***when*** her obligations under section 8(a)(3) began ***by enforcing a policy that "required pre-payment of the dues before Marquez would be cleared to perform."*** The court of appeals recognized this jurisdiction by remanding the case to the district court for further proceedings on that as-applied claim. (*See* Pet. App. at 15a-16a (emphasis added).)

In *Wegscheid v. Auto Workers 2911*, the Seventh Circuit explicitly rejected the artificial distinction, made by the court of appeals here, between claims that the terms of a collective bargaining agreement misstate employees' obligations under section 8(a)(3) and claims that a union's statements outside the agreement about those same obligations are misleading:

> If an alleged violation of section 8(a)(3) is litigable in a district court suit challenging statements made outside the collective bargaining agreement as a breach of the union's duty of fair representation, and it is, we cannot think of any reason why it should not be litigable if the statements happen to be contained in the collective bargaining agreement, since the union's duty of fair representation can be violated by union conduct in the negotiation of a collective bargaining agreement, as well as in the enforcement of it.

117 F.3d 986, 989 (7th Cir. 1997) (citations omitted). The Seventh Circuit's logic is unassailable. Indeed, the breach is more obvious in the collective bargaining agreement's case, because that is the formal statement of the union's policy.

Moreover, as the Seventh Circuit also recognized in *Wegscheid*, sound policy reasons exist for permitting Ms. Marquez to challenge in this action the "employment in the industry" clause's limitation on her fundamental statutory right to freedom of association:

> since the [court of appeals] doesn't question the district court's jurisdiction over . . . the count complaining about statements made by the union's [agents] to the plaintiff[], the implication of the [court of appeals'] position is that to challenge both those statements and the language of the union-shop clause the plaintiff[was] required to proceed in two forums—the district court and the Labor Board—or else surrender [her] judicial claim and proceed exclusively before the Board.

Id. at 989.

The court of appeals here in part justified its finding of NLRB preemption by observing that the "factually complex question of how properly to apply § 8(a)(3)'s requirements to hiring practices in the motion picture industry is precisely the kind of question that we think the NLRB was designed to address." (Pet. App. at 13a.) However, this is not a factually complex issue. It is a simple question of statutory interpretation. *See Theatrical Stage Employees Local 644*, 259 N.L.R.B. at 1416, 1422.

"Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent." *Andrus v. Glover Constr. Co.*, 446 U.S. 608, 616-17 (1980); *accord United States v. Smith*, 499 U.S. 160, 167 (1991). Congress has specified only one exception to section 8(a)(3)'s prohibition against enforcement of compulsory unionism provisions until after employees have had a thirty-day grace period with every employment relationship. *See* 29 U.S.C. § 158(f) (1988) (building and construction industry exception). Congress has made no exception for the entertainment industry, nor is there any evidence that it intended to do so.

Thus, hiring practices in the motion picture industry are irrelevant in applying the thirty-day grace period requirement, as the NLRB recognized in *Theatrical Stage Employees Local 644*, 259 N.L.R.B. at 1422.[11] Neither the courts nor the Board may make an exception to section 8(a)(3) that Congress itself has not made. *See American Guild of Variety Artists*, 163 N.L.R.B. 457, 469 (1967), *enforced per curiam*, 420 F.2d 311 (5th Cir. 1969) (only Congress can grant an exemption from section 8(a)(3) based on "the peculiarities of [the entertainment] industry").

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[11] Those hiring practices cut both ways, of course. Congress may well have concluded that application of the 30-day grace period to the entertainment industry is fair, because it avoids the situation here, in which a short-term employee is compelled to pay dues and an initiation fee that consume most, if not all, of his or her pay.

The NLRB's expertise also is irrelevant to the question of the district court's jurisdiction to decide Ms. Marquez's unfair representation claim concerning the "employment in the industry" clause. There are no exceptions to the rule that NLRB preemption "does not extend to suits alleging a breach of the duty of fair representation," whatever "the subject matter of the fair representation claim presented, ***the relative expertise of the NLRB in the particular area of labor law involved***, or any other factor." *Breininger*, 493 U.S. at 74-76 (emphasis added).

In sum, the courts below erred in not exercising jurisdiction over this claim and should have held that SAG's negotiation and maintenance of the "employment in the industry" clause breached its duty of fair representation.

III. Because Contract Reformation or Expunction Is the Appropriate Relief for a Misleading Compulsory Unionism Provision, the Employer Is a Necessary Party.

In *Bloom v. NLRB*, the Eighth Circuit held that "an adequate remedy" for a "misleading" and "overly broad" compulsory unionism clause "requires expunction of the offending clause." 30 F.3d 1001, 1004-05 (8th Cir. 1994); *accord Schreier v. Beverly Cal. Corp.*, 892 F. Supp. 225, 227 (D. Minn. 1995) (same holding in a suit for breach of the duty of fair representation). In *Buzenius v. NLRB*, the Sixth Circuit ruled "that the Board abused its discretion in refusing to order that the clause requiring that employees be 'members of the Union in good standing' either be modified to define that requirement or be removed from the CBA." 124 F.3d 788, 793 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3427 (U.S. Dec. 8, 1997) (No. 97-945).

Ms. Marquez here asked for precisely that relief, *i.e.*, an

> injunction which requires SAG and Lakeside to expunge any provisions from their collective bargaining agreements . . . which require employees to be members as a condition of

> their employment, which impose membership or financial obligations upon employees during the first 30 days of their employment, and which require employees after the expiration of 30 days of employment to pay amounts which exceed a pro rata share of SAG's costs of "collective bargaining, contract administration, and grievance adjustment."

(J.A. at 11.) Clearly, any such reformation of the contract cannot be compelled if Lakeside is not a party to this case.

Nonetheless, the court of appeals dismissed Lakeside, holding that Lakeside is not "a necessary party to obtain full relief through contract reformation, as the facial challenge to the CBA does not survive." (Pet. App. at 20a.) The Seventh Circuit reached precisely the opposite conclusion in *Wegscheid*, holding that, although the plaintiffs' facial claims were moot there, the employer "should not have been dismissed from the case, since the plaintiffs were asking the court to order a change in a contract to which [it] is a party." 117 F.3d at 988 (citing Fed. R. Civ. P. 19(a)(1) and cases).

Wegscheid's ruling is consistent with this Court's holding in *Glover v. St. Louis-San Francisco Ry.* that "federal courts may . . . properly exercise jurisdiction over ***both*** the union and the railroad" in a suit for breach of the duty of fair representation, if "the employer is made a party to insure complete and meaningful relief." 393 U.S. 324, 329 (1969) (emphasis added). It also is consistent with the "general rule" under Federal Rule of Civil Procedure 19(a)(1) that "all parties to a contract will be necessary in an action to set aside the contract." 4 James W. Moore et al., *Moore's Federal Practice* § 19.06[4], at 19-109 (3d ed. 1998); *see Shields v. Barrow*, 58 U.S. (17 How.) 130, 139-40 (1855).

Lakeside did not oppose the grant of certiorari here. It also has informed Ms. Marquez's counsel that it does not intend to

file a brief or participate in oral argument. *See supra* p. ii. Thus, Lakeside does not now oppose the courts' exercise of jurisdiction over it for the limited purpose of declaring invalid the contract provision it negotiated with SAG and ordering that provision modified or expunged. Because Lakeside is a necessary party for the relief that is appropriate on both claims at issue here, the Court should reverse the dismissal of Lakeside if Ms. Marquez prevails on either of the first two Questions Presented.

CONCLUSION

One of the NLRA's core policies is that of "voluntary unionism." *See Pattern Makers v. NLRB*, 473 U.S. 95, 104-07 (1985). Consequently, the Act "provide[s] only the most grudging authorization of [union-security] provisions," *Beck*, 487 U.S. at 755, limiting the union obligations that such provisions may impose to payment of collective bargaining costs. The court of appeals' decision violates the Act's policy of voluntary unionism and eviscerates its limits on compulsory unionism by, to put it bluntly, allowing employers and unions to lie to employees in collective bargaining agreements about the extent of the employees' obligations and when those obligations begin.

The judgments below should be reversed on all Questions Presented and remanded for the entry of summary judgment for Ms. Marquez on her claims that SAG breached its duty of fair representation by negotiating and maintaining an agreement that misleadingly stated conditions of employment that cannot lawfully be enforced—full membership, payment of full dues, and payment before thirty days of employment by Lakeside. The remand should include instructions that the district court order SAG and Lakeside to modify their current "union security"

provision so that it no longer overstates the obligations imposed, or to expunge that provision completely.

Respectfully submitted,

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NAOMI MARQUEZ,
Petitioner,
v.
SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR RESPONDENT SCREEN ACTORS GUILD

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STATUTES

NATIONAL LABOR RELATIONS ACT:

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BRIEF FOR RESPONDENT SCREEN ACTORS GUILD

STATEMENT OF THE CASE

A. The Screen Actors Guild ("SAG") is a labor organization that represents performers in the motion picture and television industry. There are hundreds of employers in the industry, and performers normally work for numerous employers on a freelance basis during any given period of time. Jt. App. 48.

In July 1994, Lakeside Productions, Inc. signed the SAG 1992 Memorandum of Agreement for Independent Motion Picture and Television Producers, binding it to the SAG Codified Basic Agreement of 1989 for Independent Producers, and the SAG Television Agreement of 1989 for Independent Producers. Jt. App. 38-40, 48.

The SAG Codified Basic Agreement contained a standard-form union security clause stating that every covered performer "shall be a member of the Union in good standing" and adding that this "condition of employment"

> shall not apply until on or after the thirtieth day following the beginning of such employment or the effective date of this Agreement whichever is the later; the Union and the Producers shall interpret this sentence to mean that membership in the Union cannot be required of any performer by a Producer as a condition of employment until thirty (30) days after his first employment as a performer in the motion picture industry. [Jt. App. 28-29.]

In implementing this union security clause, SAG requires only that covered performers pay the equivalent of uniform union initiation fees, and dues required by law. Jt. App. 49. SAG has neither interpreted nor applied the "membership" provision to require that performers become "full" members of the Union in order to be employed under a collective bargaining agreement. Jt. App. 49, 51. And

SAG notifies "financial core" employees of their right to pay solely the amount of dues and fees that is utilized for purposes related to collective bargaining. Jt. App. 51-52.

The present dispute arose after Naomi Marquez successfully auditioned for a minor role, entailing one day's work, in an episode of the television series "Medicine Ball," which was produced by Lakeside. Pet. App. 2a.

Ms. Marquez had previously performed for more than 30 days on a project for which a SAG collective bargaining agreement, governing her terms and conditions of employment, was in place. Pet. App. 2a. Consequently, under the SAG union security clause, Ms. Marquez was required as a condition of employment to pay initiation fees and dues to the Union. Pet. App. 2a.

SAG's representative testified that "it is well-known in the industry that a performer does not have to be a member of SAG to work on a project governed by a SAG contract." Jt. App. 49. Ms. Marquez's booking agents, Ingrid Fuhriman and Scott Thompson, testified that they were well aware of this fact. Ms. Fuhriman testified:

> Q: So do you advise people you represent that they should not become members of the Screen Actors Guild?
>
> A: I generally think that that is something that the person has to decide for themselves. I usually give them their options, explain to them the advantages. . . . If they're staying in Seattle, I usually say let me explain to you or give you some information about going financial core because it will provide you more opportunities here.
>
> Q: When you say financial core, what do you mean?
>
> A: Financial core is a term I'm quite familiar with. A financial core member is required to pay only for the collective bargaining agreement with the union

> and is not required to pay for any of the political agenda or any other items. And that was the reason that this was set up. However, the fallout from it is you can do both union and nonunion work. [Jt. App. 33.]

And, Mr. Thompson testified to the same effect. Jt. App. 37.

After she was notified that she received the part in "Medicine Ball," Ms. Marquez told her agents that she would be unable to take the part because she did not have the funds to cover SAG's fees. Pet. App. 3a. Over the next ten days, the interested parties engaged in a series of discussions regarding a possible arrangement whereby Ms. Marquez would pay union fees after performing on the project. *Id.* at 3a-4a. In the end, SAG advised Lakeside that the Union had no objection to the employment of Ms. Marquez in "Medicine Ball." *Id.* at 4a. However, Lakeside responded that the company had already filled the part with another performer. *Id.*

B. In December of 1994, Ms. Marquez filed a complaint in United States District Court for the Western District of Washington against SAG and Lakeside. Jt. App. 7. Ms. Marquez's lawsuit alleges two causes of action, the first against SAG for breach of the duty of fair representation, and the second against SAG and Lakeside for breach of the collective bargaining agreement. Ruling on cross-motions for summary judgment, the district court (Rothstein, J.) dismissed Ms. Marquez's complaint in its entirety. Pet. App. 4a.

On appeal, the Ninth Circuit affirmed the dismissal of Ms. Marquez's challenges to the facial legality of the SAG union security provision and the dismissal of her breach of contract claims. Pet. App. 6a-13a & 19a-21a. At the same time, the court of appeals reversed the district court's summary judgment dismissing Ms. Marquez's claim that SAG had breached its duty of fair representation by failing to inform Ms. Marquez of her range of options under

the union security agreement. In this regard, the court of appeals found that there were material disputes of fact over what SAG representatives said to Ms. Marquez, to her agents and to Lakeside's agents and that the district court had failed to consider Ms. Marquez's claim that SAG had acted arbitrarily in its *enforcement* of the agreement. *Id.* 13a-19a. The court of appeals then remanded the case to the district court for resolution of these matters. *Id.* 19a.

SUMMARY OF ARGUMENT

I. Ms. Marquez's first claim is that the duty of fair representation requires unions to negotiate union security agreements that clearly and fully set out the entire panoply of the union security rules derived from § 8(a)(3) of the National Labor Relations Act and precludes unions from negotiating the standard-form "membership" union security clauses, incorporating these rules by reference, that are included the overwhelming majority of collective bargaining agreements. Ms. Marquez argues that the use of "membership" as a "term of art" in this way is insufficiently informative, and indeed misleading, because, under § 8(a)(3), membership in the colloquial sense cannot be required as a condition of employment.

1. An integral part of the carefully balanced legislative "solution" to the union security issue enacted into law by the 1947 Congress is the express, unequivocal permission —provided in the interest of promoting industrial stability and of facilitating the collective bargaining process—for employers and unions to "enter into agreements requiring all the employees in a given bargaining unit to become members." S. Rep. No. 105, 86th Cong., 1st Sess., 7 (1947). That permission was vouchsafed as part of an overall legislative scheme that places limits on what the parties to such "membership" union security agreements can require, *in enforcing the agreements*, of covered employees in the way of membership obligations, and does so

in a manner that does not require the parties to spell out those limits in their collective bargaining agreement.

The proposition that a union violates its fair representation duty—derived from the NLRA—by negotiating an agreement within the express permission Congress wrote into the NLRA and tracking the statutory language in which Congress wrote that permission, flies in the face of the statute. Pp. 8-27 *infra*.

2. Ms. Marquez's duty of fair representation theory not only runs directly counter to Congress' express permission in NLRA § (a)(3) to negotiate "membership" union security agreements, it fails also because it has no base in the general theory of the duty of fair representation.

Under the duty of fair representation defined by this Court's decisions, "the final product of the bargaining process may constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' that it is wholly 'irrational' or 'arbitrary.'" *Airline Pilots v. O'Neill*, 499 U.S. 65, 78 (1991) quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

In this regard, NLRA § 8(a)(3)'s first proviso, at the very least, contemplates the negotiation of "membership" union security agreements. And, the term "membership" in § 8(a)(3) was understood by Congress, and has been understood by the NLRB and the courts, as a labor law "term of art" whose meaning incorporates the statutory limitations on required membership as a condition of employment. The office of a standard-form "membership" union security agreement, like that of contract clauses generally, is to establish an enforceable contract consistent with public law. By reason of their predominance, their acceptance over time, their relative simplicity, and the settled understanding of their meaning, the standard-form "membership" union security provision provides an effec-

tive medium for expressing the parties' agreement to the most complete union security system consistent with law.

It is self-evident that this "final product of the bargaining process" *cannot* "be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly 'irrational' or 'arbitrary.'" *O'Neill*, 499 U.S. at 78. Pp. 27-34 *infra*.

3. Ms. Marquez's suggestion that recognizing the validity of standard-form "membership" union security agreements frees unions to misuse the provision to suggest to employees that they must be full union members does not do justice to the governing law. The Act prevents just the level of misuse hypothesized by Ms. Marquez. Unions—in taking any initiative to sign up members, in responding to any employee initiative or inquiry, and in taking any action to enforce a union security agreement—must accurately explain to the employee the meaning of the "membership" requirement. And unions failing to meet that obligation commit an unfair labor practice. Pp. 34-40 *infra*.

II. Ms. Marquez's second claim is that SAG breached its duty of fair representation by negotiating an elaboration on the contractual 30-day grace period provision that she contends is contrary to the grace period requirement in NLRA § 8(a)(3), as interpreted by the National Labor Relations Board. The lower courts correctly held that this claim alleges an unfair labor practice within the exclusive jurisdiction of the NLRB. While the federal courts do have jurisdiction over fair representation claims, plaintiffs may not circumvent the primary jurisdiction of the NLRB simply by casting statutory unfair labor practice claims as violations of the union's duty of fair representation. Insofar as Ms. Marquez now attempts to escape the court of appeals' preemption ruling by advancing a new claim that the 30-day provision is misleading, that claim both comes too late in the day and is, in any event, without substance. Pp. 40-50.

ARGUMENT

I. THE SCREEN ACTORS GUILD DID NOT BREACH ITS DUTY OF FAIR REPRESENTATION BY NEGOTIATING A "MEMBERSHIP" UNION SECURITY AGREEMENT.

The first of the questions presented by Ms. Marquez to this Court is whether the Screen Actors Guild

> breached its duty of fair representation when it negotiate[d] and maintain[ed] a compulsory unionism provision that, on its face, requires—misleadingly—that an employee be 'a member of the Union' and pay the periodic dues and initiation fee 'uniformly required as a condition of acquiring membership,' even though those requirements cannot lawfully be enforced literally as a condition of employment? [Pet. i.]

That question is framed by two bodies of labor law, each of some complexity—first, the law defining a union's duty of fair representation; and second, the law giving meaning to the term "membership" in the provisos to § 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(3), and in union security agreements negotiated by employers and unions pursuant to that statutory provision.

To put the question presented in its legal context, we therefore begin by outlining both the union security agreement at issue and the basic legal rules that form the background for this case. Next, we analyze the claim here in some detail to show how those rules apply in this particular instance.

After those preliminaries and with their lessons in mind, we demonstrate that the negotiation of standard-form "membership" union security clauses is expressly permitted by the NLRA, and that the duty of fair representation, derived from the NLRA itself, cannot be pressed into service to make a "wrong" out of what the Act makes a "right." Rather, as the court of appeals recognized, what the Act provides in the way of a counterbalance to the

permission to negotiate "membership" union security agreements is a set of limits on their administration and enforcement including, of most pertinence to Ms. Marquez's claim, the requirement that unions "inform workers" of their "option[s]" for meeting the required conditions of employment. Pet. App. 16a.

A. The SAG Union Security Clause and Its Statutory Derivation.

Since Ms. Marquez's attack is on the bare words of the SAG union security clause standing alone, it facilitates the analysis of that claim to set out those words and their derivation.

Subsection 2 A of the Codified Basic Agreement states as follows:

> Every performer hereafter employed by any Producer, whether by contract or otherwise, or who acts before the camera, or who makes sound track within the Union's jurisdiction, for any Producer, shall be a member of the Union in good standing. [Jt. App. 28.]

Subsection 2 B of the Agreement, in turn, states the following limitation on a producer's obligation to employ only SAG "members":

> The Producer shall not be held to have violated this paragraph if it employs a performer who is not a member of the Union in good standing, if the Producer has reasonable grounds for believing that membership in the Union was not available to such performer on the same terms and conditions generally applicable to other members, or if the Producer has reasonable grounds for believing that membership in the Union was denied to such performer or such performer's membership in the Union was terminated for reasons other than the failure of the performer to tender the periodic dues and the initiation fee uniformly required as a condition of acquiring or retaining membership in the Union. . . . [Jt. App. 29.]

The terms of these two provisions of the Codified Basic Agreement are taken almost word-for-word from the two provisos to NLRA § 8(a)(3), the first of which is addressed to the *negotiation* of union security agreements and the second of which is addressed to the *enforcement* of such agreements once negotiated.

The first proviso to § 8(a)(3) expressly states in the most unequivocal terms a permission to *negotiate* "membership" union security agreements:

> Nothing in this Act, or in any other statute of the United States shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein. . . . [29 U.S.C. § 158(a)(3).]

The locution in Subsection 2 A of the Codified Basic Agreement—"every [employed] performer . . . shall be a member of the Union in good standing." Jt. App. 28—simply puts the statutory permission, which is stated in the passive—*viz.*, as a permission to labor organizations and employers to "mak[e] an agreement . . . to require . . . membership [in the labor organization]"—into the active form normally used to state a contractual requirement. And, while the agreement here is phrased in terms of membership "*in good standing*," Jt. App. 28 (emphasis added), whereas the statute is phrased in terms of "membership," the terms "membership" and "membership in good standing" have long been understood as synonymous in the union security context. *See Firestone Tire & Rubber Co.*, 93 NLRB 981, 983 (1951); *Keystone Coat, Apron & Towel Supply Co.*, 121 NLRB 880, 885 (1958).[1]

---

[1] It bears emphasis that in this Court, as in the lower courts, Ms. Marquez's claim is that standard-form "membership" union security agreements—both those phrased in terms of "membership" *and* those phrased in terms of "membership in good standing"—form a single legal class and that a union's negotiation of any such agreement constitutes a violation of the duty of fair representation. This is most conspicuous in the First Question Presented which challenges the portion of the SAG union security clause here re-

NLRA 8(a)(3) goes on, in its second proviso, to state certain limitations on the *enforcement* of the union security agreements authorized by the first proviso by stating:

> no employee shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. [29 U.S.C. § 158(a)(3).]

Subsection 2 B of the Codified Basic Agreement is virtually a verbatim recitation of this statutory provision. Jt. App. 29.

In sum, what SAG has done here is to negotiate a union security agreement that denotes the pertinent obligations in the terms expressly authorized by Congress and that includes, for extra measure, a verbatim recitation of the statutory restrictions on the agreement's enforcement.

B. The Basic Duty of Fair Representation Principles.

"[B]ecause the national labor policy vested unions with power to order the relations of employees with their employer . . . this Court found it necessary to fashion the duty of fair representation." *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 181 (1967). That duty "is an important check on the arbitrary exercise of union power, but it is a purposefully limited check, for a 'wide range

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quiring covered employees to be "a member of the Union" and does not even refer to the clause's "in good standing" language. Pet. i In responding to the First Question Presented we therefore follow Petitioner's lead and treat with the legal status of standard-form "membership" union security agreements and do so without distinguishing between those that add the "in good standing" phrase from the NLRB's "model clause" set out in the *Keystone* case and those that do not.

of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents.'" *Steelworkers v. Rawson*, 495 U.S. 362, 374 (1990), quoting *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953).

In concrete terms, then, "[a] breach of the statutory duty of fair representation occurs *only* when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith." *Vaca v. Sipes*, 386 U.S. 171, 190 (1967) (emphasis added). And, a union's actions are "arbitrary," within the meaning of this standard, "only if, in light of the factual and legal landscape at the time of the union's actions, the union's behavior is so far outside a 'wide range of reasonableness,' *Ford Motor Co. v. Huffman*, 345 U.S. 330, 338 (1953), as to be irrational." *Air Line Pilots v. O'Neil*, 499 U.S. 65, 67 (1991). The type of discrimination "prohibited by the duty of fair representation" is, moreover, "invidious 'discrimination.'" *Id.* at 81.

Thus, Ms. Marquez, as any duty of fair representation plaintiff (must establish that SAG's conduct—negotiating a "membership" union security clause that tracks NLRA § 8(a)(3)'s language—is irrational, invidiously discriminatory, or in bad faith.

C. The Basic Union Security Agreement Principles.

Turning to NLRA § 8(a)(3) and the law of union security agreements, the one certain point is that "agreements requiring 'membership' in a labor union . . . are expressly permitted by the [first] proviso" to NLRA § 8(a)(3). *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 751 (1963). That being so, standard-form "membership" union security agreements are by far the most common form of union security agreement. U.S. Dept. of Labor, "Major Collective Bargaining Agreements: Union Security and Dues Checkoff Provisions," Bulletin 1425-21 (May 1982) pp. 5-6 & text table 1. *See also* Bureau of National Affairs, *Collective Bargaining: Contract Negotiations and Agreements* vol. 2, pp. 140:2801-02 (1998).

Indeed, a 1995 survey by the Bureau of National Affairs of some 4,000 collective bargaining agreements in its data base—including more than 700 agreements that contained no union security clause because of a state law barring such provisions, *see* NLRA § 14(b)—found that 78% of the agreements had union security clauses phrased in terms of "membership." Bureau of National Affairs, *Collective Bargaining: Contract Negotiations and Agreements* vol. 1, pp. 24:301-302 (1996).[2]

As the structure of § 8(a)(3)—a basic prohibition accompanied by two intertwined provisos—would suggest, the 1947 Congress, in crafting that provision, sought to harmonize a number of competing labor policy objectives. Very briefly stated, the union security provisos to § 8(a)(3) embody Congress' determination, first, to prohibit the "closed shop" while expressly permitting the "union shop," and, second, to limit what unions can require of employees covered by "union shop" agreements by way of "membership" as a condition of employment.

In the last regard, the National Labor Relations Board and this Court, in the process of interpreting NLRA § 8(a)(3) and its provisos, have ruled that, while an employee's action in joining a union and assuming the status of full member (with all of the accompanying membership rights and obligations) most assuredly satisfies the require-

[2] "Union-shop" clauses were in 64% of the agreements, "modified union shop" clauses were in 10% of the agreements and "maintenance of membership" clauses were in 4% of the agreements. *Id.* at 24:301-302. These three types of union security clause all speak in terms of requiring "membership" as a condition of employment.

In addition to these three types of "membership" union security clauses, 4% of the agreements contained "agency shop" clauses, which do not speak in terms of requiring membership but rather of requiring covered employees to pay an amount equal to union dues and initiation fees. *Id.* at 24:301.

Sixteen percent of the agreements covered bargaining units that were located wholly within states that have outlawed union security clauses. *Id.* at 24:302-303.

ment stated in a standard-form "membership" union security agreement, so does an employee's action in tendering to the union an amount equal to the union's initiation fees and dues while otherwise maintaining a nonmember status. *See Union Starch and Refining Co.*, 87 NLRB 779, 781 (1949), *enf'd*, 186 F.2d 1008 (7th Cir.), *cert. denied*, 342 U.S. 815 (1951) ("an employee who tenders to a union holding a valid union-shop contract an amount equal to the initiation fees and accrued dues thereby brings himself within the protection from discharge contained in the provisos of Section 8(a)(3)"). In this sense, "'[m]embership' as a condition of employment is whittled down to its financial core." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). And, by reason of NLRA §§ 7 & 8(b)(1)(A), an employee covered by a union security agreement who chooses to become a full union member has the right to resign that status at any time and assume a "financial core" status. *Pattern Makers v. NLRB*, 473 U.S. 95 (1985).

It is also to the point that *Communications Workers v. Beck*, 487 U.S. 735 (1988)—which addressed "whether this 'financial core' includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment,"—holds that NLRA § 8(a)(3) "does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes." *Id.* at 745. That being so, in the end, an objecting "financial core" employee's union security obligation is further "whittled down" to paying a percentage of union dues equal to the percentage of the union's total expenditures that are chargeable. *See Ellis v. Railway Clerks*, 466 U.S. 435 (1984).[3]

[3] There are still other limitations on a union security agreement's scope of application in addition to those discussed above in text.

For example, individuals with religious convictions against financially supporting a labor union are free of all obligation to pay dues or fees under a union security clause and may be required to make

As the court of appeals put it, the upshot of these rulings is that "the concept of 'membership' in CBAs has become a term of art." Pet. App. 7a.

D. Ms. Marquez's Claim.

The ultimate point of Ms. Marquez's claim is that the entire panoply of NLRA § 8(a)(3) union security agreement rules must be clearly and fully set out in each union security clause and cannot be incorporated by reference through a standard-form "membership" union security clause. Ms. Marquez argues that the use of "membership" as a "term of art" in this way is misleading, because membership in the colloquial sense cannot be required as a condition of employment, and clauses that use this legal shorthand "require[] employees to consult extraneous sources to discover their true rights and obligations." Pet. Br. 8.

Ms. Marquez's position in this regard is far reaching and unequivocal—a union that negotiates a standard-form "membership" union security clause "breaches the duty of fair representation, no matter whether the union enforces it as written." Pet. Br. 15. And, so that there can be no mistake, Ms. Marquez adds that "[n]otice of employees' true rights [under the clause] from extraneous sources or separate notices is insufficient," no matter how clear and effective the notice may be. Pet. Br. 14.

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contributions to a charity in lieu of the dues payments. 29 U.S.C. § 159.

In addition, the NLRB has held that individuals who have been expelled or otherwise excluded from membership in the union for reasons other than failure to pay dues are also free of all obligation under a union security clause to pay dues or fees. *See Communications Workers of America, Local 1104 v. NLRB*, 520 F.2d 411 (2d Cir. 1975), *cert. denied*, 423 U.S. 1051 (1976).

And, no employee can be required to pay an initiation fee that is "excessive or discriminatory" in the context of "the practices and customs of labor organizations in the particular industry, and the wages currently paid to the employees affected." 29 U.S.C. § 158(b)(5).

Ms. Marquez is equally clear about the legal consequences of the rule of law she advocates. Her claim is, of course, stated as a duty of fair representation claim and sounds in terms of a union dereliction in negotiating a union security agreement that has the capacity to mislead covered employees into becoming full union members, and not in terms of any substantive shortcoming in the agreement. But Ms. Marquez does not argue for an order requiring the agreement to be clarified or to be supplemented by a clarifying notice. Nor does she seek a remedy directed to covered employees who have been misled by the agreement into full union membership or even to employees who have arguably been so misled. Instead, it is Ms. Marquez's position that her claim leads to an order declaring "invalid the contract provision," Pet. Br. 30, and rendering the provision a nullity of no force or effect for any purpose with regard to any covered employee.[4]

To understand the precise scope of Ms. Marquez's fair representation claim it is important to be quite clear about what she is *not* claiming.

- First, while the gravamen of her complaint is that the SAG union security clause does not properly inform covered employees of their rights and obligations, Ms. Marquez does *not* allege that she ever saw the collective bargaining agreement containing the clause, much less that she ever read that clause. Nor does she allege that anyone made any reference to the wording of the clause at any time during the period in question. Indeed, Ms. Marquez does not even allege that prospective employees of Lakeside Productions, such as herself, receive copies of either the

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[4] Ms. Marquez's position on this score is a matter of brute necessity. As we have noted—and we develop further below—there is no evidence in this record that Ms. Marquez read the SAG union security clause much less that she was misled as to her union membership obligations by its wording; to the contrary the evidence is that Ms. Marquez was well advised in this regard and that she was not misled in any way.

SAG 1992 Memorandum of Agreement for Independent Motion Picture and Television Producers signed by Lakeside—which did not itself set out the union security clause—or of the SAG Codified Basic Agreement—incorporated by reference in the Memorandum of Agreement—which did contain the clause. *See* Jt. App. 28-32 & 38-42.

• Second, Ms. Marquez does not rest her attack on the SAG union security clause on any claim that she was, in fact inadequately informed on her rights and obligations concerning union membership. SAG's representative, who was involved in this matter, testified, without contradiction, that "it is well-known in the industry that a performer does not have to be a member of SAG to work on a project governed by a SAG contract." Jt. App. 49. And, confirming that statement, Ms. Marquez's agent—who was representing her in dealing with Lakeside Productions in connection with the events that precipitated this case—testified that she (the agent) was "quite familiar" with the legal rule that a "financial core member is required to pay only for the collective bargaining agreement" and that she advises her clients that assuming this status is "very beneficial" because "you can do both union and nonunion work." Jt. App. 33. *See also id.* at 36. Moreover, the court of appeals, recognizing that "unions have a duty to inform workers of the 'core' payment option," remanded this case for a determination of whether SAG had fulfilled that duty by informing Ms. Marquez of her rights in that regard. Pet. App. 16a.

• Third, while she seeks to invalidate the SAG union security clause, Ms. Marquez makes no claim that the substance of the clause is in any way contrary to the substance of the governing NLRA public law or that SAG in enforcing the clause has required anything of covered employees—such as full membership in the union or the payment of full union dues or fees by objecting "financial core" employees—that is contrary to the governing NLRA law. The uncontradicted evidence here establishes both that "it is not necessary that a performer become a 'member' of SAG in order to work under a SAG agreement," and that SAG "sends notices to all performers who . . . decline membership" informing them that they "have the right . . . to object to paying that portion of SAG dues which is allocable to non-representational activities." Jt. App. 49, 51, 52. *See also* Pet. App. 4a n.1.

Ms. Marquez's modest proposal, then, is that it is "irrational, disciminatory, or bad faith" *per se* for a union to negotiate a "membership" union security agreement that tracks the statutory language permitting such agreements, and that, by reason of that *per se* fair representation breach, the SAG union security clause here—and, of course, the standard-form "membership" union security clauses in the overwhelming majority of the collective bargaining agreements in this country—are "invalid" for all purposes.

E. Congress' Express Permission to Negotiate "Membership" Union Security Agreements.

Ms. Marquez's submission is belied by the statute itself. The 1947 Congress expressly provided for the negotiation of standard-form "membership" union security agreements and did so in full contemplation of the fact that NLRA § 8(a)(3) and its provisos make "membership" a labor law "term of art."

Nothing is better settled than that the "courts must presume that a legislature says in a statute what it means and means in a statute what is says there." *Connecticut National Bank v. Germain*, 503 U.S. 249, 253-254 (1992). And, as we have just noted, "the [first] proviso to § 8(a)(3) . . . *expressly permit*[*s*] agreements conditioning employment upon *membership* in a labor union." *Schermerhorn*, 373 U.S. at 751 (emphasis added). As we have also seen, it is Ms. Marquez's claim that, by reason of the duty of fair representation, the "membership" union security agreement permitted by § 8(a)(3) are invalid.

Thus, what Ms. Marquez wants here is to make a fair representation *wrong* out of what the NLRA declares to be the statutory *right* of "an employer . . . [and] a labor organization [that] is the representative of the employees as provided in section 9(a) of the Act." NLRA § 8(a)(3). But on the most basic principles of statutory construction, the duty of fair representation—which is, after all, derived from the NLRA—cannot be used to override the plain language of the statute. And, that is particularly clear in this instance, since Congress went to great care to assure the legality of "membership" union security clauses.

In amending the Wagner Act to put § 8(a)(3) in its present form, the 1947 Congress "devoted the most mature deliberation . . . [to] the problem posed by compulsory union membership." S. Rep. No. 105, 80th Cong., 1st Sess., 5 (1947), reprinted in 1 NLRB, *Legislative History of the Labor Management Relations Act of 1947* 411 (1948) ("LMRA Leg. Hist."). Recognizing that this was "[a] controversial issue," S. Rep. No. 105 at 6, Congress "reach[ed] what it consider[ed] a solution of the problem which does justice to both points of view," *id. See Machinists Local v. Labor Board*, 362 U.S. 411, 418 n.7 (1960).

An integral part of this carefully balanced legislative "solution" is the express, unequivocal permission—*provided in the interest of promoting industrial stability and of facilitating the collective bargaining process*—for employers and unions to "enter into agreements requiring all the employees in a given bargaining unit to become members." S. Rep. No. 105 at 7. That permission, moreover, was vouchsafed as part of an overall legislative "solution" that placed limits on what the parties to such "membership" union security agreements could require—*in enforcing the agreements*—of covered employees in the way of membership obligations as a condition of employment. The proposition that a union violates its fair representation duty by negotiating an agreement within the express permission Congress wrote into the Act and tracking the statutory language, including the "term of art," in which Congress wrote that permission, thus flies in the face of the statute.

(1) The language of NLRA § 8(a)(3) as enacted was taken from the Senate Committee bill. H. Conf. Rep. No. 510, 80th Cong., 1st Sess. 41 (1947), 1 LMRA Leg. Hist. at 545. And, the Senate Report explaining that amendment drew a sharp distinction between a "closed shop" and a "union shop." S. Rep. No. 105 at 6. It was the view of the Senate Labor Committee that "the closed shop which requires preexisting union membership as a condition of obtaining employment creates too great a barrier to free employment to be longer tolerated." *Id.* By contrast, union shop "agreements requiring all the employees in a given bargaining unit to become members 30 days after being hired" do not create such barriers to free employment and were permitted. *Id.* at 7. Reflecting these views, the Senate Report explained that § 8(a)(3) "abolishes the closed shop but permits voluntary agreements for requiring such forms of compulsory membership as the union shop. . . ." *Id.* at 3.

In his "comprehensive statement" introducing the Senate bill, 2 LMRA Leg. Hist. at 1009, Senator Taft drew the same distinction between the "closed shop," which would be forbidden, and the "union shop," which would be permitted. *Id.* In "a closed shop . . . the employer binds himself not to employ anyone unless he is a member of the union at that time," while in a "union shop . . . an employer may employ anyone whom he chooses to employ, but after 30 days such employee has to join the union or else the employer can no longer employ him." *Id.*

In this opening speech, Senator Taft explained why he opposed outlawing the union shop:

> [T]he union shop has been in force in many industries for many years, and to upset it today probably would destroy relationships of long standing and

> probably would bring on more strikes than it would cure. [2 LMRA Leg. Hist. at 1010.]

Senator Taft made the same point in opposing Senator Ball's proposal to forbid union shop agreements:

> We considered the arguments [for abolishing the union shop] very carefully in the committee and I myself came to the conclusion that since there had been for such a long time so many union shops in the United States, since in many trades it was entirely customary and had worked satisfactorily, I at least was not willing to go to the extent of abolishing the possibility of a union-shop contract. [2 LMRA Leg. Hist. at 1420.]

Thus, the Senate Labor Committee—and then the Senate and the Congress—decided on a course that "*will permit the continuation of existing relationships, and will not violently tear apart a great many long-existing relationships and make trouble in the labor movement; and yet at the same time it will meet the abuses which exist.*" *Id.* (emphasis added).

(2) In addition to the closed-shop/union-shop issues dealt with in what became the first proviso to NLRA § 8(a)(3), the "abuses" of union security agreements that concerned the Senate Labor Committee involved "the way union leaders have used closed-shop devices as a method of depriving employees of their jobs, and in some cases a means of securing a livelihood in their trade or calling, for purely capricious reasons." S. Rep. No. 105 at 6.[5]

To meet such abuses, the Senate bill contained "three additional safeguards," beyond those stated in the first proviso, "in order to safeguard the rights of employees *after such a* [*union shop*] *contract has been entered into.*"

[5] A frequently cited example was that of "a union member [who] was subpoenaed to appear in court, [and] [b]ecause he told the truth upon the witness stand, the union leadership brought about his expulsion with a consequent loss of his job. . . ." *Id.* at 6-7.

S. Rep. No. 105 at 7 (emphasis added). The "three additional safeguards" identified in the Senate Report were:

> (1) Membership in the union must be available to an employee on the same terms and conditions generally applicable to other members; (2) expulsion from a union cannot be a ground of compulsory discharge if the worker is not delinquent in paying his initiation fees or dues' (3) if a worker is denied membership or expelled from the union because he exercises the right conferred on him by the act to work for the change of a bargaining representative at an appropriate time, he cannot be discharged. [*Id.*]

The first two of these safeguards are expressly incorporated into the second proviso to § 8(a)(3), and the third is implicit in that proviso.

It is, thus, "the section's *second* proviso [that] mandates that . . . union membership is 'whittled down to its financial core.'" *Gilbert v. NLRB*, 56 F.3d 1438, 1441 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1171 (1996) (emphasis added). *See NLRB v. General Motors*, 373 U.S. at 742. And, that mandate applies only "*after* such a [union shop] contract has been entered into . . . ." S. Rep. No. 105 at 7 (emphasis added).

Indeed, the second proviso's limitations on the enforcement of union security agreements were drafted in such a way as to minimize employer interference with the internal affairs of labor organizations. In this regard, the Senate Report explained:

> The tests provided by the amendment are based upon facts readily ascertainable and do not require the employer to inquire into the internal affairs of the union. [S. Rep. No. 105 at 20.]

This purpose is reflected in the different restrictions imposed on employers and unions with respect to the dismissal of employees pursuant to the terms of a union

security agreement. Employers are forbidden to "discriminat[e] against an employee for nonmembership in a labor organization" where the employer has *"reasonable grounds for believing* that such membership was not available to the employee on the same terms and conditions generally applicable to other members" or was "denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining members." NLRA § 8(a)(3) (emphasis added). By contrast, unions are forbidden "*to cause or attempt to cause an employer . . . to discriminate* against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and initiation fees uniformly required. . . ." NLRA § 8(b)(2) (emphasis added).

(3) Read together and according to their plain meaning, then, § 8(a)(3)'s two provisos stand for the proposition that "an employer and a union may contract to require as a condition of employment that unit employees maintain 'membership' in the union, provided that membership is available to all and that it requires nothing more than 'tender[ing] the periodic dues and the initiation fees uniformly required.' 29 U.S.C. § 158(a)(3)." *Finerty v. NLRB*, 113 F.3d 1288, 1290 (D.C. Cir.), *cert. denied*, 118 S. Ct. 558 (1997).

The decision to proceed in this way—*to specify a lawful contract clause using a term of art and to place limits on its enforcement without requiring that those limits be spelled out in the clause*—represents not mere inadvertence but a careful policy judgment. As Senator Taft explained, in so framing § 8(a)(3), Congress' intent was to create a regime that "will permit the continuation of existing relationships, and will not violently tear apart a great many long-existing relationships and make trouble in the labor movement; and yet at the same time it will

meet the abuses which exist." 2 LMRA Leg. Hist. at 1420.

F. The Status of Union Security Agreements as Lawful and Enforceable Contracts.

Not surprisingly then, as Senator Taft expected, and as we have noted, the unequivocal permission in NLRA § 8(a)(3)'s first proviso to negotiate standard-form "membership" union security agreements has resulted in their being by far the most common form of union security agreement. And, in an equally unsurprising development, it has been recognized from the start that these "membership" union security agreements are consistent with the requirements of the governing NLRA public law.

(1) As this Court noted in *Local 147, Teamsters v. Lucas Flour Co.*, 369 U.S. 95 (1962), "Words in any legal document are ambiguous, but the body of law which grows up in an area through decision helps to dispel this ambiguity." *Id.* at 104 n.11, quoting Wellington, "Labor and the Federal System," 26 U. of Chi. L. Rev. 542, 557 (1959). For just this reason, "[c]ontracts are presumed to be written in contemplation of the existing applicable law," and, therefore, "the legal framework that existed at the time of a contract's execution must bear on its construction." *Florida East Coast Railway Co. v. CSX Transportation, Inc.*, 42 F.3d 1125, 1129 (7th Cir. 1994). This is a corollary of the more general rule that contracts should be "interpreted in accordance with a relevant usage if each party knew or had reason to know of the usage and neither party knew or had reason to know that the meaning attached by the other was inconsistent with the usage." *Restatement (Second) of Contracts* § 220(1) (1981). *See also* 3 *Corbin on Contracts* § 545 (1960).

A fair summary of "the body of law which [has] grow[n] up in [the § 8(a)(3)] area," *Lucas Flour*, 369 U.S. at 104 n.11, is, as the court of appeals noted, that

"the concept of 'membership' in CBAs has become a term of art." Pet. App. 7a. That was plainly Congress' understanding in drafting § 8(a)(3), which, in its first proviso, permits unions and employers to negotiate "membership" union security clauses, and, in its second proviso, makes "membership" a term of art by limiting the scope of the clause's enforcement to the discharge of employees who fail to tender to the union its uniformly required periodic dues and initiation fees. And, that is the lesson of the NLRB and court decisions that interpret § 8(a)(3) and its provisos in a manner that gives a particular labor law content to the term "membership" in that statutory provision.

Thus, reading the term "member" in the SAG union security clause according to its legally prescribed meaning and common usage in the union security context, the clause "lends itself to a logically acceptable construction that renders [it] legal and enforceable." *Walsh v. Schlecht*, 429 U.S. 401, 408 (1977). And, of course, this Court has squarely held that a union security agreement that is capable of such a lawful construction is to be so read and "cannot be held illegal because it failed affirmatively to disclaim all illegal objectives." *NLRB v. News Syndicate Co.*, 365 U.S. 695, 700 (1961).

(2) Against that background, this Court, in elaborating on the meaning of the term "membership" in the provisos to NLRA § 8(a)(3) and on the limits the law places on the administration and enforcement of standard-form "membership" union security clauses, has gone out of its way to affirm the validity of such clauses.

In *Radio Officers v. NLRB*, 347 U.S. 17 (1954), the Court held that, while "the proviso to § 8(a)(3) . . . authorizes employers to *enter into* certain union security contracts," the statute "prevent[s] the *utilization* of union security agreements for any purpose other than to compel payment of union dues and fees." *Id.* at 40-41 (emphasis added). *Radio Officers* thus ratified the understanding of § 8(a)(3) reached by the NLRB in *Union Starch and Refining Co.*, 87 NLRB at 781-786. And, the lesson of *Union Starch* is that, "even where 'membership' is specifically required in a *valid* union-security contract, the union in particular situations cannot enforce the actual membership but can obtain at most the periodic dues and initiation fees." *General Motors Corp.*, 133 NLRB 451, 458 (1961), *aff'd*, 373 U.S. 734 (1963) (emphasis added).[6] As *Radio Officers* states, "membership" union security agreements are among the "certain union security contracts" that "the proviso to § 8(a)(3) . . . authorizes employers [and unions] to enter into." 347 U.S. at 40.

Communications Workers v. Beck, *supra*, on which Ms. Marquez relies heavily, is to the same effect as *Radio Officers* with regard to the legality of standard-form union security agreements. The *Beck* opinion begins from the premise that NLRA § 8(a)(3) "*permits* an employer and

[6] The legality of union shop agreements is underscored by this Court's opinion in *NLRB v. General Motors Corp.*, *supra*, which considered "whether the agency shop is an unfair labor practice under § 8(a)(3) of the Act or else is exempted from the prohibitions of that section by the [first] proviso thereto." 373 U.S. at 735. An agency shop "places the option of membership in the employee while still requiring the same monetary support as does the union shop," *id.* at 744, and "rel[ying] upon the express words of the proviso which allow employment to be conditioned upon 'membership,'" the employer argued that "since the union's proposal [of an agency shop] does not require actual membership but demands only initiation fees and monthly dues, it is not saved by the proviso," *id.* at 741. Starting from the premise that "[i]t is permissible to condition employment upon membership," *id.* at 742, the Court added that it could "find nothing in the legislative history of the Act indicating that Congress intended the amended proviso to § 8(a)(3) to validate only the union shop and simultaneously to abolish, in addition to the closed shop, all other union-security arrangements permissible under state law," *id.* at 741. To the contrary, the Court found that "[t]here is much to be said for the Board's view that, if Congress desired in the Wagner Act to permit a closed or union shop and in the Taft-Hartley Act *the union shop*, then it also intended to preserve the status of less vigorous, less compulsory contracts which demanded less adherence to the union." *Id.* at 741 (emphasis added).

an exclusive representative to enter into an [agency shop] agreement" of the sort involved in that case and addresses only "whether this provision *also permits* a union, over the objections of dues-paying nonmember employees, to expend funds so collected on activities unrelated to collective bargaining, contract administration, or grievance adjustment. . . ." 487 U.S. at 738 (emphasis added). The holding in *Beck* that § 8(a)(3) "does not permit a union, over the objections of nonmembers, to expend compelled agency fees on political causes" is based on the "controlling" precedent of *Machinists v. Street*, 367 U.S. 740 (1961). 487 U.S. at 745. And, *Street* emphatically states that "the union-shop agreement itself is not unlawful." 367 U.S. at 771. Consistent with *Street*, the *Beck* opinion repeatedly states that "§ 8(a)(3) *permits* an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employement. . ." 487 U.S. at 745 (emphasis added; footnote omitted). *See also id.* at 749 ("§ 8(a)(3) allows employers to enter into agreements requiring all the employees in a given bargaining unit to become members").

Indeed, in *Machinists v. Street*, the Court—while agreeing with the lower court that once the plaintiffs "have . . . made known to their respective unions their objection to the use of their money for the support of political causes . . ., the respective unions were without power to use payments thereafter tendered by them for such political causes"—held that "*an injunction restraining enforcement of the union-shop agreement is . . . plainly not a remedy appropriate to the violation of the Act's restriction on expenditures.*" 367 U.S. at 771 (emphasis added).[7] *Railway Clerks v. Allen*, 373 U.S. 113 (1963),

[7] In this regard, the Court explained:

> [T]he union-shop agreement itself is not unlawful. *Railway Employes' Dept. v. Hanson*, [351 U.S. 225 (1953)]. . . . [The objecting fee payers'] grievance stems from the spending of their funds for purposes not authorized by the Act in the face of their objection, not from the enforcement of the union-shop agreement by the mere collection of funds. If their money were used for purposes contemplated by § 2, Eleventh, the [objectors] would have no grievance at all. We think that an injunction restraining enforcement of the union-shop agreement is therefore plainly not a remedy appropriate to the violation of the Act's restriction on expenditures. . . . Moreover, restraining collection of the funds as the Georgia courts have done might well interfere with the appellant unions' performance of those functions and duties which the Railway Labor Act places upon them to attain its goal of stability in the industry . . ., and threatens the basic congressional policy of the Railway Labor Act for self-adjustments between effective carrier organizations and effective labor organizations. [367 U.S. at 771-772.]

decided two years after *Street*, is to the same effect. *See id.* at 122 ("no decree would be proper which appeared likely to infringe the union's right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining"). And, by the time of *Ellis v. Railway Clerks*, the law was so clear on this score that the Court simply noted that the plaintiffs "do not contest the legality of the union shop as such, *nor could they*." 466 U.S. at 439 (emphasis added).

G. Ms. Marquez's Claim Here and the General Theory of the Duty of Fair Representation.

The foregoing demonstrates that Ms. Marquez's duty of fair representation theory runs directly counter to Congress' express permission in NLRA § 8(a)(3) to negotiate "membership" union security agreements. But we would be remiss if we did not add that her claim fails also because it has no base in the general theory of the duty of fair representation.

Under the duty of fair representation defined by this Court's decisions, "[a]ny substantive examination of a union's performance" in negotiations is "highly deferential"—"the final product of the bargaining process may

constitute evidence of a breach of duty only if it can be fairly characterized as so far outside a 'wide range of reasonableness,' *Ford Motor Co. v. Huffman*, 345 U.S., at 338, that it is wholly 'irrational' or 'arbitrary.' " *O'Neill*, 499 U.S. at 78. In this regard, all the following is highly relevant and beyond reasonable dispute:

• NLRA § 8(a)(3)'s first proviso, at the very least, contemplates the negotiation of "membership" union security agreements. And, that proviso does so in the interest of "permit[ting] the continuation of existing relationships [embodied in such agreements] and [of] not violently tear[ing] apart a great many long-existing relationships." 2 LMRA Leg. Hist. at 1420.

• The term "membership" in § 8(a)(3)'s first proviso was understood by Congress, and has been understood by the NLRB and the courts, as a labor law "term of art" whose meaning incorporates the limitations on required membership as a condition of employment stated in § 8(a)(3)'s second proviso and in the Board and court cases construing that statutory provision. And, under the normal principles of contract interpretation the term "membership" as used in a union security clause is read *in pari materia* with that term in § 8(a)(3).

• The office of a standard-form "membership" union security agreement, like that of contract clauses generally, is to establish an enforceable contract rule (or set of rules) binding on the parties and consistent with public law. Precisely because it is contemplated by the statute and is phrased in a "term of art" read to incorporate the applicable public law rules, a standard-form "membership" union security clause is well-suited to that office.

• The "member of the Union in good standing" language in SAG's union security clause follows the "model union-security clause" prescribed by the NLRB as "in conformity with the requirements of

the Act." *Keystone Coat*, 121 NLRB at 885. *See Local 74, Service Employees International Union (Parkside Lodge of Connecticut, Inc.)*, 323 NLRB No. 39 (March 21, 1997), slip op. 2 n.9, *pet. for rev. dism'd as moot sub nom., Orce v. NLRB*, No. 97-4038 (2d Cir. Dec. 9, 1997) ("there is no warrant for finding the 'members-in-good-standing' language of [a] union-security clause unlawful on its face").[8]

• By reason of their predominance, their acceptance over time, their relative simplicity, and the settled understanding that they do incorporate the gov-

[8] It is worthy of emphasis that from 1947 through the negotiation of the SAG Codified Basic Agreement in 1989 and Lakeside's adoption of that agreement in 1994 the NLRA law was absolutely uniform on the proposition that "membership" union security agreements—including those phrased in terms of "members of the Union in good standing"—are "in conformity with the requirements of the Act." *Keystone Coat*, 121 NLRB at 885. Neither of the 1993-1994 cases cited by Ms. Marquez did anything to disturb that uniformity.

Far from overruling *Keystone* in this regard, as Ms. Marquez asserts, Pet. Br. 21 n.10, the NLRB's decision in *Electrical Workers, I.U.E. 444 (Paramax Systems)*, 311 NLRB 1031, 1037 (1993), specifically holds that "the clause, with its phrase 'members of the Union in good standing,' . . . is capable of a lawful construction." Moreover, this holding was affirmed in *I.U.E. v. NLRB*, 41 F.3d 1533, 1539 (D.C. Cir. 1994), in an opinion expressly *rejecting* the argument—repeated here—that this Court's decisions "compel the conclusion that union-security agreements requiring 'membership in the union in good standing' are unlawful on their face."

In *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994), the court of appeals overturned an NLRB order approving settlement agreements—and dismissing a complaint alleging that the collective bargaining agreement in that case contained an "overly broad union security clause" that had been "unlawfully interpreted and applied" —the "clause was unlawfully interpreted and applied" and "an adequate remedy [for such unlawful interpretation and application] requires expunction of the offering clause." *Id.* at 1005. Whether right or wrong on what constitutes an "adequate remedy" in such a case, *Bloom* has no application to the situation here, where the union security clause has *not* been "unlawfully interpreted and applied."

> erning public law, the standard-form "membership" union security provision provides an effective medium for expressing the parties' agreement to include in their collective bargaining agreement the most complete union security system consistent with law. In that way, the permission to negotiate such provisions facilitates collective bargaining and furthers industrial stability.

All that being so, it is self-evident that this "final product of the bargaining process" *cannot* "be fairly characterized as so far outside a 'wide range of reasonableness' that it is wholly 'irrational' or 'arbitrary.' " *O'Neill*, 499 U.S. at 78 (citation omitted).

Indeed, Ms. Marquez's view—that unions have a duty to frame agreements in transparent language that reveals the covered employees' rights and duties in encyclopedic detail and not in terms of art that can only be fully understood by the employees through reference to external sources—has nothing to recommend it. That view would shrink to the vanishing point the "wide range of reasonableness" allowed to unions in negotiating labor contracts and, by so doing, would undermine the "practice and procedure of collective bargaining" it is the overall policy of the Act to "encourag[e]." NLRA § 1.

This Court has recognized that, as a general matter

> The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time. Because of the compulsion to reach agreement and the breadth of the matters covered, as well as the need for a fairly concise and readable instrument, the product of negotiations (the written document) is, in the words of the late Dean Shulman, "a compilation of diverse provisions: some provide objective criteria almost automatically applicable; some provide more or less specific standards which require reason and judgment in their application; and

> some do little more than leave problems to future consideration with an expression of hope and good faith." Shulman, ["Reason, Contract, and Law in Labor Relations," 68 Harv. L. Rev. 999], at 1005. [*Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 580 (1960).]

Perhaps the paradigm example of a "less specific standard" on a matter of the most fundamental importance to the employer, the union and the covered employees is the standard arbitration clause. *Teamsters Local v. Lucas Flour* concerned the effect of a grievance-arbitration provision on the union's—and the employees'—right to strike over an arbitrable matter. And, *Lucas Flour* holds that "a strike to settle a dispute which a collective bargaining agreement provides shall be settled exclusively and finally by compulsory arbitration constitutes a violation of the agreement." 369 U.S. at 105. In other words, the *Lucas Flour* Court read the standard collectively bargained arbitration clause—which contain no explicit reference to strikes—to entail a commitment by the union not to strike over arbitrable issues.

No uninformed third person, not versed in labor law, reading a standard arbitration clause would find a no-strike promise in the words of such an agreement. Indeed, Justice Black accused the *Lucas Flour* majority of having found "out of clear air . . . this additional unwritten promise by the union." 369 U.S. at 106-107. At the same time, no decision suggests that a union breaches its duty of fair representation by failing to have a full explanation of the no-strike obligation entailed in the arbitration clause spelled out in the agreement. Nor is there any decision standing for the proposition that arbitration clauses that do not spell out the implicit no-strike obligation are invalid and of no force or effect. Indeed, invalidating arbitration clauses for lack of transparency would have the paradoxical effects of negating a plain meeting of the minds on the arbitration of contract disputes and of

denying the employer the benefit of the *Lucas Flour* rule implying a no-strike commitment.

The deleterious effects for collective bargaining that would flow from *requiring* the union and employer to agree on a statement of the full effects of an arbitration clause should be obvious. The parties, as the Court has stated, do start from "contrary and to an extent antagonistic viewpoints and concepts of self-interest." *Labor Board v. Insurance Agents*, 361 U.S. 477, 488 (1960). In any given negotiation, one party or the other may well be loath to set out *in haec verba* an elaboration of the clause's effects out of concern for the impact on its interests—the union in being able to strike whenever that seemed called for, and the employer in being able to seek damages should a strike be called. There are, after all, a host of second-level issues that may never arise but are difficult to work through in detail, such as, the status of sympathy strikes, unfair labor practice strikes, or health and safety walk-outs. Positioning for advantage in hypothetical disputes can only make it exceedingly difficult to agree to any clause providing for the arbitration of contract disputes.

If anything, negotiation of the proper wording of a union security agreement that spells out all of the rights and obligations of covered employees would prove more contentious.

The proper administration of a union security agreement—in particular the obligation to reduce the amounts charged to objecting "financial core" employees—is a matter of fair representation, and thus is primarily, if not exclusively, the union's responsibility. *See Communications Workers v. Beck*, 487 U.S. at 743-744. There is no reason to suppose that employers would not make tactical use of the opportunity to bargain over a statement of the *union's* obligations by taking an extreme position in order to press for concessions on other contract terms or to hobble the union with restrictions going beyond what the law requires. *See North Bay Dev. Disabilities Services,*

Inc. v. NLRB, 905 F.2d 476, 479 (D.C. Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991) ("the practical effect of such enforced bargaining could well be to require a union to negotiate with an employer the amount that it will devote to representation of employees in the future . . ., which is surely an internal union matter of no proper concern to the employer").

The problem is compounded by the fact that what constitutes an adequate summary of the rights and obligations of employees covered by union security clauses is a highly contested matter. Nothing demonstrates this as well as the recent experience of the NLRB in *Group Health, Inc. (OPEIU Local 12)*, 325 NLRB No. 49 (Jan. 30, 1998), slip op. 1, *pet. for rev. pending, Bloom v. NLRB*, No. 97-1582 (8th Cir.). In *Group Health*, the employer and union respondents renegotiated their union security agreement in attempt to settle unfair labor practice charges against them by satisfying the demand that "a union-security clause requiring employees to become and remain 'members of the Union in good standing' as a condition of employment, [set out a] concurrent definition in the collective bargaining agreement," stated in *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *pet. for cert. pending sub nom., Paperworkers v. Buzenius*, No. 97-945. The question of whether the settlement agreements succeeded in their purpose of framing a concise and accurate statement of the legal rights and obligations created by the union security clause there elicited no fewer than four different opinions from the five members of NLRB. 325 NLRB No. 49, slip op. 1-4 (Fox & Liebman), 2 n.10 (Hurtgen), 4-7 (Gould), & 7-9 (Brame). Indeed, the District of Columbia Circuit had a similar division over whether a union notice properly described the rights and obligations of employees covered by union security agreements. *Abrams v. Communications Workers*, 59 F.3d 1373 (D.C. Cir. 1995). *Compare id.* at 1378-80 (Henderson & Silberman, JJ.) *with id.* at 1382-84 (Tatel, J., dissenting).

If NLRB members and circuit court judges cannot agree among themselves about how to accurately and succinctly describe the rights and obligations of employees covered by union security agreements, introducing this contentious issue into collective bargaining for resolution by the contending employer and union parties—each with its opposing interests—can only serve to "violently tear apart a great many long-existing relationships and make trouble in the labor movement." 2 LMRA Leg. Hist. at 1420 (Sen. Taft). That, of course, is precisely what Congress meant to avoid by drafting NLRA § 8(a)(3) as it did.

H. The Union Duty to Inform Employees of Their Rights and Obligations Under a Union Security Agreement.

In the end, Ms. Marquez's argument depends not on legal analysis but on a subliminal image—the image of employees covered by a standard-form "membership" union security agreement being provided with a copy of the agreement, and nothing more, put in isolation, and then required to take the step of joining the union and becoming full union members and of this fatefull step being taken under a legal regime in which unions have no legal duty to provide the covered employees with further information on their rights and obligations regarding union membership.

This emotive image—like so many of its kind—distorts reality. Indeed, the record in this case is sufficient to dispel this false picture. Nothing Ms. Marquez said or did here—and nothing Lakeside or SAG said or did—turns on the fact that the underlying union security agreement is set out in a "membership" clause rather than an agency fee clause or a clause spelling out the rights and obligations incorporated in the term "membership" as an NLRA § 8(a)(3) "term of art." And, everything of record indicates that Ms. Marquez—directly or through

her booking agents—understood each and every one of the public law limitations on—and inherent in—a "membership" union security clause.

To be sure, most employees don't have booking agents. But, in the nature of things, an employee cannot join a union in isolation—an interaction with the union's officers or members is necessary. And, in the run of cases, that interaction takes place not after an isolated study of a union security agreement, but in response to a union initiative.

This reality is very much to the legal point here. Ms. Marquez's suggestion that recognizing the validity of standard-form "membership" union security clauses frees unions to misuse the clause to suggest to employees that they must be full union members rests on a truncated rendition of the applicable law.

The Act prevents just the misuse hypothesized by Ms. Marquez. Unions—in taking any initiative to sign up members, in responding to any employee initiative or inquiry, and in taking any action to enforce a union security clause—must accurately explain to the employee the meaning of the 'membership" requirement. Unions failing to meet that obligation commit an unfair labor practice. "The comprehensive authority vested in the union, as the exclusive agent of the employees" gives rise to a "duty requir[ing] that the union inform the employee of his obligations in order that the employee may take whatever action is necessary to protect his job tenure" under the union security clause. *NLRB v. Hotel Employees' Union, Local 568*, 320 F.2d 254, 258 (3d Cir. 1963). And, the employer's concomitant obligation is not to discharge an employee "when the employer has reasonable grounds to believe that the union has failed to fulfill its fiduciary obligation." *Conductron Corp.*, 183 NLRB 419, 428 (1970). *See NLRB v. Zoe Chemical Co.*, 406 F.2d 574, 583 (2d Cir. 1969).

As the NLRB has recently stated the governing rule, unions have a duty "to notify newly hired nonmember employees of their rights under *Beck* [to object, if a nonmember] and *General Motors* [to refrain from membership], at the time the union first seeks to obligate these newly hired nonmember employees to pay dues." *Paperworkers International Union (Weyerhauser Paper)*, 320 NLRB 349, 350 (1995), *rev'd on other grounds sub nom., Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *pet. for cert. pending sub nom., Paperworkers v. Buzenius*, No. 97-945. *See also Abrams*, 59 F.3d at 1378-81 (recognizing such a duty on the part of the union); *Nielsen v. Int'l Ass'n of Machinists*, 94 F.3d 1107, 1115 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 1426 (1997) (same).

In the same vein, the decision of the court of appeals below recognizes that "unions have a duty to inform workers of the 'core' payment option." Pet. App. 16a. And, although SAG presented evidence that it did comply with that duty, Jt. App. 48-52, the court of appeals remanded for further proceedings on that issue. Pet. App. 18a. At the same time, as the court below also recognized, the critical point for present purposes is, in the Seventh Circuit's words, that nothing in the law "indicates that information of this detail must appear in the union security clause itself." *Nielsen*, 94 F.3d at 1115.

The Act, as Congress wrote it, then, both furthers the collective bargaining process by permitting standard-form "membership" union shop clauses *and* protects the employee right to refrain from union activity by policing union (and employer) invocation and enforcement of the clause.

The foregoing brings us to—and demonstrates the error of reasoning in—the court of appeals decision on which Ms. Marquez relies mostly heavily—*Wegscheid v. Local Union 2911, UAW*, 117 F.3d 986 (7th Cir. 1997).[9] We begin by emphasizing that *Wegscheid* is the weakest of reeds for Ms. Marquez to hold on to. As *Wegscheid*

[9] The other court of appeals decision issued after the events here in question that Ms. Marquez invokes—*Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *pet. for cert. pending sub nom., Paperworkers v. Buzenius*, No. 97-945—follows *Bloom v. NLRB*, *supra*, and is not in point here for the same reason that *Bloom* is not in point. See p. 29, n.8, *supra*. Like *Bloom*, *Buzenius* addresses the question of whether the NLRB "abused its discretion in fashioning [its] remedial order," after "finding that a party has committed an unfair labor practice" in administering a union security clause. 124 F.2d at 789-790. And, the first question presented here deals with an entirely distinct legal issue from the remedy issue presented in those cases—whether a standard-form "membership" union security agreement is valid on its face, without regard to whether the clause has been properly applied and enforced.

Buzenius, moreover, turns on a distinction between "membership *in good standing*" union security agreements and "membership" union security agreements that, as we have noted, p. 9, n.1, *supra*, Ms. Marquez purposefully eschews. *Buzenius* thus correctly recognizes that "the Act explicitly permits an employer to enter into a CBA that contains a union-security clause requiring employees to acquire and retain 'membership' in a union as a condition of employment." 124 F.3d at 790. *See also id.* at 791 ("§ 8(a)(3) of the Act explicitly allows union-security clauses that require union 'membership' as a condition of employment") & 793 ("Congress, through § 8(a)(3), has sanctioned union-security clauses requiring union 'membership' as a condition of employment"). And, *Buzenius*, while emphasizing that "union-security clauses are valid in general," *id.* at 791, holds that, in contrast, "a union-security clause requiring employees to become and remain 'members of the Union in good standing' as a condition of continued employment, without concurrent definition in the collective bargaining agreement" is not, *id.* at 788. *See also, id.* at 791 ("a union-security clause that requires 'membership in good standing,' without concurrent definition of that term"), *id.* at 792 ("a union-security clause requiring 'membership in good standing' without further explanation in the CBA"), & *id.* at 793 ("include 'membership in good standing' language, without further definition, in the CBA"). This holding is, for the reasons we have stated in the text, incorrect. And, in any event, given the way Ms. Marquez has framed her first question presented to this Court, this holding is of no aid to her here.

came to the court of appeals, the plaintiffs' claim was reduced to the same entirely "abstract" challenge to the " 'facial validity' of the union shop," *id.* at 990, that Ms. Marquez makes in this Court. And, in the end, the court of appeals *rejected* this "facial invalidity" claim and dismissed the case as moot. *Id.* at 991. Thus, Ms. Marquez can only press bits and pieces of *Wegscheid*'s reasoning into her service.

Wegscheid first recognizes that standard-form "membership" union security agreements are "a close and accurate paraphrase of the statute," and then dismisses the significance of this parallel on the ground that "the Supreme Court has glossed the statute to change its literal meaning, indeed virtually to invert it." 117 F.3d at 990. And, in the same vein, *Wegscheid* then goes on to opine that "the only realistic explanation for the retention of the statutory language in collective bargaining agreements . . . is to mislead employees about their right not to join the union." *Id.*

On this basis, the *Wegscheid* court concluded that employees covered by a "membership" union security agreement can state a fair representation claim by alleging that "the union misled them about their right to substitute the agency fee for union membership and full dues by the language of the union-shop clause and by statements made in person by union officers." 117 F.3d at 990. And, on that view of the law, "the only issue" in the case was "the likely effect of the misleading language of the collective bargaining agreement on these plaintiffs." *Id.* Because the "plaintiffs [made] no argument that they themselves are being misled by it," their challenge to the language of the agreement was dismissed as moot. *Id.* Indeed, the court stated that employees who have received "emphatic assurances by the union . . . that they don't have to join the union or pay anything more than the [reduced] agency fee [should they object] . . . would have a hard time persuading anyone that the collective bargaining agreement should be changed in order to protect them." *Id.*

The burden of our showing thus far is that *Wegscheid* is wrong in its essential premises. Congress' unequivocal permission to negotiate standard-form "membership" union security agreements was given with full understanding that, by reason of other statutory provisions going to the enforcement of such agreements, "membership" is a labor law "term of art." The NLRB's leading 1949 decision in *Union Starch* and this Court's decisions from *Radio Officers* through *Beck* do *not* "invert" the *intended* statutory meaning of "membership," they effectuate it. And, the "realistic explanation" of why nearly every union security agreement is a standard-form "membership" agreement is that this formulation is the accepted convention for expressing the parties' meeting of the minds on including in their collective bargaining agreement the most complete form of union security permitted by law. This convention facilitates the negotiation of such agreements, whereas the lack of such a convention could only frustrate the already difficult task of setting out a comprehensive charter for the workplace.

So that we are not misunderstood, none of this is to say that unions can make a secondary use of a "membership" union security clause to mislead employees regarding the meaning of that agreement and its legal effects. To the contrary, as we have emphasized, the employees *do* have a right to "emphatic assurances by the union . . . that they don't have to join the union or pay anything more than the agency fee. . . ." 117 F.3d at 990. Where such assurances are given, no one is misled. And, where the assurance are not given, the law provides a remedy by requiring the union to provide the necessary assurance and to return the affected employees to the position they would have been in had they been adequately apprised of their rights. *See Rochester Manufacturing Co. (Teamster Local 614)*, 323 NLRB No. 36, slip op. 4 (March 12,

1997), *pet. for rev. pending sub nom. Cecil v. NLRB*, No. 97-5302 (6th Cir.) (ordering union to notify employees of their rights and to retroactively honor resignations from membership and nonmember objections by reimbursing the nonchargeable portion of the objectors' agency fees).

Beyond that, in its ultimate terms—as opposed to the mischaracterizations and misunderstandings of the NLRA and the developed case law expressed along the way—*Wegscheid* is fatal to Ms. Marquez's claim here. On the present state of the record, her claim based on the wording of the SAG "membership" union security clause and its effect on her is most certainly moot. Ms. Marquez cannot "with a straight face" claim that the wording of the clause confused her or misled her in any way or that "a change in the collective bargaining agreement" would be of any significance to her. 117 F.3d at 990. The record evidence is that Ms. Marquez never saw the clause and was never apprised of its wording. Here, even more than in *Wegscheid*, the attack on the wording of the clause is an effort to bring at least a blush of color to an otherwise colorless "union misrepresentation" duty of fair representation claim.

II. THE CLAIM THAT THE CONTRACT'S 30-DAY GRACE PERIOD HAS BEEN APPLIED IN A MANNER THAT VIOLATES NLRA § 8(a)(3) IS WITHIN THE PRIMARY JURISDICTION OF THE NATIONAL LABOR RELATIONS BOARD.

In addition to challenging the "member of the Union" provision in SAG's union security clause, Ms. Marquez challenged the "30 day grace period" provision in that clause as "a misapplication of the first proviso of NLRA § 8(a)(3)." Pet. App. 10a. The courts below—quite rightly—dismissed this "grace period" claim as "preempted by the NLRB's exclusive jurisdiction." *Id.* at 13a.

A. The first proviso to NLRA § 8(a)(3) authorizes "an employer . . . making an agreement with a labor organization . . . to require as a condition of employment membership therein," but only "on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later." 29 U.S.C. § 158(a)(3).

Subsection 2 B of the SAG Codified Basic Agreement contains the following 30-day grace period provision:

> The foregoing subsection A, requiring as a condition of employment membership in the Union, shall not apply until on or after the thirtieth day following the beginning of such employment or the effective date of this Agreement, whichever is the later; . . . . [Jt. App. 28.]

Ms. Marquez does *not* mount any challenge to this grace period provision, which closely tracks the language of § 8(a)(3).

What Ms. Marquez *does* challenge is the parties' elaboration on the foregoing set out in the next clause of Subsection 2 B of the agreement:

> [T]he Union and the Producers interpret this sentence to mean that membership in the Union cannot be required of any performer by a Producer as a condition of employment until thirty (30) days after his first employment as a performer in the motion picture industry. . . . [Jt. App. 28-29.]

The agreement goes on to explain the legal basis of the foregoing gloss on the basic grace period provision and its provisional status:

> The interpretation contained in the first sentence of subsection B. of this Section 2 has been approved by an advisory opinion of the General Counsel of the National Labor Relations Board. If such approval of such sentence is changed by a ruling of such General Counsel, then the new ruling of such general

> counsel shall prevail, until the same is overruled by the Board or a court of competent jurisdiction. If the Board or a court of competent jurisdiction shall change said ruling in a proceeding in which the Union is a party, then the new ruling or opinion shall prevail, until the same is reversed by a court of competent jurisdiction. [Jt. App. 31.]

Ms. Marquez claims that this elaboration of the 30-day grace period rule is contrary to, and hence is invalidated by, NLRA § 8(a)(3) on the theory that it "den[ies]" covered employees "the separate thirty-day grace period with each employment that is their statutory right." Pet. Br. 23. In the court below, she presented her grace period claim in the following syllogism. Her major premise was:

> "[Under the] first proviso to section 8(a)(3) . . . employees have a statutory, thirty-day grace period with every employer." [Appellant's Ninth Cir. Br. 42.]

Her minor premise was:

> "The 'Union Security' provision of the agreement between SAG and Lakeside required 'as a condition of employment [by Lakeside] membership in the Union . . . thirty (30) days after [the person's] first employment as a performer **in the motion picture industry**.' Thus, the agreement denied employees the separate thirty-day grace period with each employment that is their statutory right . . ." [Appellant's Ninth Cir. Br. 42 (emphasis in brief; citation to record omitted).]

And, the conclusion she drew from these premises was:

> "[T]he union's conduct [in negotiating and enforcing this clause] violated the duty [of fair representation] **because** section 8(a)(3) of the Act prohibited that conduct." [Appellant's Ninth Cir. Br. 44 (emphasis in brief).]

The federal courts have undoubted jurisdiction over duty of fair representation claims. At the same time, it is perfectly well settled that " '[w]hen an activity is arguably

subject to § 7 or § 8 of the [NLRA], . . . *the federal courts* must defer to the exclusive competence of the [Board].' " *Communications Workers v. Beck*, 487 U.S. at 742 (emphasis in original), quoting *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245 (1959). That being so, the lower courts were clearly correct in their ruling "that this claim is preempted by the NLRA because it is nothing other than an unfair labor practices claim, depending entirely on the question of the proper interpretation of § 8(a)(3)." Pet. App. 11a. As the court of appeals explained:

> [T]he challenge to SAG's interpretation of the 30-day grace period required by the NLRA does not raise the § 8(a)(3) claim as a collateral issue in an otherwise straightforward fair representation claim. Her claim rests squarely upon the proper interpretation of § 8(a)(3): if the CBA's 30-day term is proper under § 8(a)(3) then SAG wins; if not Marquez prevails. [*Id.* at 12a-13a]

Comparison of Ms. Marquez's "member of the Union" claim with her "grace period" claim highlights the correctness of the court of appeals' preemption analysis and holding.

An allegation that a union has misled employees about their obligations under a union security agreement is, substantively, a "claim that the union failed to represent [the employees'] interests fairly and without hostility," and is, in that sense, the kind of fair representation claim presented in *Beck*. 487 U.S. at 743. And, the fact that the Union here, like the union in *Beck*, "seek[s] to defend [it]-sel[f] on the ground that the statute authorizes precisely this type of agreement" does not divest the federal courts of jurisdiction. *Id.*

But, while the *Beck* Court held it had jurisdiction over the fair representation claim in that case, the Court dismissed a claim that "the union has contravened the express terms of § 8(a)(3)" as "fall[ing] squarely within the

primary jurisdiction of the Board." 487 U.S. at 742. And, the Court emphasized that plaintiffs "may not circumvent the primary jurisdiction of the NLRB simply by casting statutory claims as violations of the union's duty of fair representation." *Id.* at 743. As we have seen, Ms. Marquez's grace period claim is that the second part of the grace period provision in SAG's agreement "contravenes[s] the express terms of § 8(a)(3)." *Id.* at 742. That claim, therefore, "falls squarely within the primary jurisdiction of the Board." *Id.* As the Third Circuit put it, in dismissing a lawsuit similarly alleging that a standard-form union security clause violated NLRA § 8(a)(3), this "claim turns *Beck* on its head" by "not invok[ing] Section (a)(3) as a defense," but "[r]ather, . . . attempt-[ing] to use it to attack the collective bargaining agreement." *Beverly Enterprises-Pennsylvania v. Dist. 1199C*, 90 F.3d 93, 95 (3rd Cir. 1996).[10]

The line of demarcation *Beck* drew follows the one laid out in *Motor Coach Employees v. Lockridge*, 403

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[10] *Breininger v. Sheet Metal Workers*, 493 U.S. 67 (1989), on which Ms. Marquez relies to argue that she may cast an NLRA § 8(a)(3) claim as a fair representation claim, Pet. Br. 24 & 28, is of no help to her. *Breininger* held that there was federal court jurisdiction over a fair representation claim that a union, "in its representation of [the plaintiff], has acted arbitrarily, discriminatorily, and/or without reason or cause . . . in making job referrals, . . . [that] favored a faction of members . . . who have been known to support . . . the present business manager. . . ." *Id.* at 72. That claim did *not* rest on an allegation that the discriminatory referrals violated the unfair labor practice provisions of the NLRA. To the contrary, the Court noted that, in ruling on this DFR claim, "[w]e need not decide the appropriate scope of §§ 8(b)(1)(A) and 8(b)(2) because we reject the proposition that the duty of fair representation should be defined in terms of what is an unfair labor practice," and emphasized that "[t]he duty of fair representation is not intended to mirror the contours of § 8(b). . . ." *Id.* at 86. It would, of course, be impossible to rule on Ms. Marquez's "grace period" claim without "decid[ing] the appropriate scope of §§ 8[(a)(3)] and 8(b)(2)," for the reasons explained by the courts below.

U.S. 274 (1971). The *Lockridge* Court held that a breach of the duty of fair representation claim brought by an employee who has been discharged under a union security clause for dues delinquency is preempted under *Garmon*. 403 U.S. at 293. While acknowledging that *Garmon* preemption does not extend to a true claim of a breach of the duty—which "carries with it the need to adduce substantial evidence of discrimination that is intentional, severe, and unrelated to legitimate union objectives" —the Court warned that if the "congressional policies *Garmon* seeks to promote are not to be swallowed up, the very distinction . . . between honest, mistaken conduct, on the one hand, and deliberate and severely hostile and irrational treatment, on the other, needs strictly to be maintained." 403 U.S. at 301.

Ms. Marquez cannot escape the force of *Beck* and *Lockridge* through the device of claiming that it is "arbitrary" to adopt a 30 day grace rule that a complaining party *argues* is contrary to § 8(a)(3). The only way to test the proposition that a particular grace period rule is *in fact* contrary to § 8(a)(3)—and thus an NLRA unfair labor practice—is to present that unfair labor practice charge to the NLRB for determination. And, as the court below quite aptly noted, "the *Beck* court specifically warned federal courts not to be hoodwinked by a plaintiff's attempt to side-step the exclusive jurisdiction of the NLRB over unfair labor practices claims. . . ." Pet. App. 12a.

B. Precisely because Ms. Marquez's "grace period" claim "rests squarely upon the proper interpretation of § 8(a)(3)," Jt. App. 13a, the *only* precedent cited in support of the merits of her position are NLRB decisions. Pet. Br. 22-28. Indeed, it is on the basis of this NLRB precedent that Ms. Marquez contests the court of appeals' observation that this case presents a "factually complex question of how properly to apply § 8(a)(3)'s requirements to hiring practices in the motion picture industry," Pet. App. 13a, by asserting, to the contrary, that "[i]t is

a simple question of statutory interpretation," Pet. Br. 27. The "simple" interpretation of the statute, on which Ms. Marquez's bases her "grace period" claim, is that because "the first proviso to NLRA section 8(a)(3) permits only compulsory unionism clauses in which '*an employer* . . . require[s] as a condition of employment membership . . . on or after the thirtieth day following the beginning of *such* employment' . . ., employees have a statutory, thirty-day grace period with every employment relationship." Pet. Br. 22 (emphasis in original). We digress to point out that this "simple" interpretation is not consistent with the reasoning of the NLRB case law.

The NLRB, for example, has indicated that employees are *not* entitled to a new "thirty day grace period with every employment relationship," Pet. Br. 22, where a multi-employer bargaining unit is involved. *Mayfair Coat & Suit Co.*, 140 NLRB 1333, 1334-35 (1963). *See also Asbestos Workers, Local No. 5 (Insulation Specialties Corp.)*, 191 NLRB 220 (1971) (construing § 8(f)(2)'s 7-day grace period applicable in the construction industry). And, *Theatrical Stage Employees Local 644*, 259 NLRB 1415 (1982)—on which Ms. Marquez places principal reliance for establishing the merits of her "grace period" claim, *see* Pet. Br. 23, 24 & 27—expressly recognizes that "the existence of a multiemployer bargaining unit . . . might, even in the absence of continuous employment, provide some theoretical basis for legality" for calculating the 30-day grace period from the first day of employment with any employer who has signed the union agreement. 259 NLRB at 1422.

Contrary to her position, then, *Mayfair Coat & Suit* indicates that requiring Ms. Marquez to begin paying dues immediately upon employment by Lakeside, so long as Lakeside was within a multiemployer unit, was entirely lawful, since "earlier . . . she worked more than 30 days on a movie that was covered by a SAG agreement." Pet. App. 2a.

The basic test the Board would apply to determine whether Lakeside has joined the multi-employer unit which originally negotiated the Memorandum of Agreement for Independent Motion Picture and Television Producers is "whether or not the employer has indicated an 'unequivocal intention' to be a part of the bargaining unit." *NLRB v. New York Typographical Union*, 632 F.2d 171, 183 (2d Cir. 1980). Moreover, the Board has indicated that where there is a "multiemployer agreement to which the various contractors have executed letters of assent to be bound," it may be appropriate to apply a single grace period to employment by any signatory employer, whether or not that particular employer has actually joined the multiemployer unit. *Millwright & Machinery Erectors Local No. 740 (Tallman Constructors)*, 238 NLRB 159, 161 n.5 (1978).[11] The "ground rules for multiemployer bargaining have not come into being overnight[,] [t]hey have evolved and are still evolving, as the Board [has] employ[ed] its expertise in the light of experience. . . ." *Charles D. Bonanno Linen Service v. NLRB*, 454 U.S. 404, 413 (1982).

As the foregoing shows, the court of appeals was correct in recognizing that this case does not present the

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[11] The Board makes this suggestion in discussing *Interstate Electric Co.*, 227 NLRB 1996 (1977), which held that preference can be given in hiring hall referrals for persons with work experience under signatories to the contract, even if those signatories are not part of a multiemployer bargaining unit, but merely employers who sign on to a multi-employer agreement. In construing the phrase "based upon service with *such employer*" in NLRA § 8(f)(4), the Board reasoned "it is more consistent with the purposes of that section to interpret the word 'employer' as including any employer who, although not a member of the multiemployer association with which the union negotiated the collective-bargaining agreement, has agreed to be bound by such agreemnt while performing work in that union's area of geographical jurisdiction." *Id.* at 1998. Of course, the Board's construction of the phrase "such employer" in § 8(f) is directly contrary to Ms. Marquez's construction of the similar phrase "such employment" in § 8(a)(3). *See* Pet. Br. 22.

occasion to further develop this law with respect to "[t]he factually complex question of how properly to apply § 8(a)(3)'s requirements to hiring practices in the motion picture industry," because that "is precisely the kind of question that . . . the NLRB was designed to address." Pet. App. 13a.

In any event, it would not advance Ms. Marquez's preemption argument one step to establish that the NLRB has definitively concluded that an interpretation of the thirty day grace period such as that applied by the parties' to SAG's agreement violates § 8(a)(3). The courts have no more jurisdiction over clear unfair labor practices than over debatable ones.[12] As this Court has emphasized:

> The technique of administration and the range and nature of those remedies that are and are not available is a fundamental part and parcel of the operative legal system established by the National Labor Relations Act. "Administration is more than a means of regulation; administration is regulation." [*Lockridge*, 403 U.S. at 287, quoting *Garmon*, 359 U.S. at 243.]

"A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." *Garner v. Teamsters Union*, 346 U.S. 485, 490-491 (1953).

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[12] This is so, if for no other reason, because the Board can change its mind about the appropriate application of the Act in a given context. Even if *Theatrical Stage Employees* did provide the unequivocal support for her position that Ms. Marquez believes it does, the ruling on which she relies was made by an administrative law judge and affirmed by the Board without extended discussion. 259 NLRB at 1416. That being so, the Board might well completely reconsider the portion of that case relied upon by Ms. Marquez were it presented with the circumstances of the instant case. And, such reconsideration would be entitled to the same level of deference as the Board's initial pronouncement. *NLRB v. Curtin Matheson*, 494 U.S. 775, 787 (1990).

Simple or not, then, there is no getting around the fact that the "question of statutory interpretation," Pet. Br. 27, raised by Ms. Marquez's "grace period" claim is squarely within the primary jurisdiction of the NLRB. And, this question of statutory interpretation does *not* "emerge as [a] collateral issue[]," *Beck*, 487 U.S. at 743, with respect to the "grace period" claim. Rather, the unfair labor practice issue is essential to this claim—"if the CBA's 30-day term is proper under § 8(a)(3) then SAG wins; if not Marquez prevails." Pet. App. 13a.

C. To be sure, in an attempt to avoid Judge O'Scannlain's cogent preemption analysis, Ms. Marquez now seeks to recast her claim to be that "SAG's negotiation of [a] misleading 'employment in the industry' requirement breached the duty of fair representation." Pet. Br. 22 (bold face and capitalization omitted). That claim, like Ms. Marquez's "member of the Union" claim—and unlike the "grace period" claim presented to the courts below—is cast as a duty of fair representation claim cognizable in the federal courts.

But the word "misleading" does not appear once in the section of Ms. Marquez's Ninth Circuit brief addressed to the grace period issue. Appellant's Ninth Cir. Br. 42-47. To the contrary, in this regard, Ms. Marquez's complaint was that "SAG enforced the agreement according to its terms." *Id.* at 43. "[I]t is too late in the day for [Ms. Marquez] to present to the Court [her] newfound legal theory." *Electrical Workers v. Hechler*, 481 U.S. 851, 864 n.5 (1987).

There is, moreover, good reason that Ms. Marquez did not initially frame her "grace period" claim in terms of the agreement being misleading—such a claim is patently frivolous. There is nothing "misleading" about the 30-day grace period provision in the SAG Codified Basic Agreement. That agreement provides for a 30-day grace period in precisely the terms dictated by NLRA § 8(a)(3). And, in the provision Ms. Marquez complains of, the

contract elaborates on the grace period rule with regard to Ms. Marquez's exact situation. Jt. App. 28. Moreover, the contract states the legal basis for the parties' interpretation of the grace period provision and defines the kinds of NLRB rulings that would serve to suspend or negate that interpretation. *Id.* at 31. Indeed, Ms. Marquez's complaint is *not* that the agreement misinforms employees of the parties' true interpretation of the grace period provision but rather that their interpretation as accurately stated in the agreement is, in her view, contrary to NLRA § 8(a)(3).

The agreement's elaboration on the basic 30-day grace period stated both in the agreement and in NLRA § 8(a)(3) may—or may not—be in conformity with the governing law. That, as we have seen, is a question for the NLRB. But it is most definitely clear, plain, and, in present respects, complete, and it is in no way misleading.

CONCLUSION

The decision of the court of appeals should be affirmed.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

NAOMI MARQUEZ,

Petitioner,

v.

SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S REPLY BRIEF

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ARGUMENT

I. The National Labor Relations Act Does Not Authorize Unions to Negotiate Compulsory Unionism Provisions That Cannot Lawfully Be Enforced Literally.

A. The Statute's Text Does Not Support the Schizophrenic Construction That SAG Proposes.

Respondent Screen Actors Guild ("SAG") does not deny that the "union security" clause of its collective bargaining agreement with Respondent Lakeside Productions, Inc. ("Lakeside") literally requires full union membership and payment of full union dues and initiation fees. SAG also does not deny that those requirements cannot lawfully be enforced. (*See* SAG's Br. at 12-13.) Yet, SAG argues that its negotiation and maintenance of that clause do not breach its duty of fair representation, because "what SAG has done here is to negotiate a union security agreement that denotes the pertinent obligations in the terms expressly authorized by Congress." (*Id.* at 9-10.)

In fact, Congress ***never*** "expressly authorized" compulsory unionism agreements in any particular ***form*** or ***language***. Instead, in section 8(a)(3) of the National Labor Relations Act ("NLRA" or "Act"), 29 U.S.C. § 158(a)(3) (1994), Congress authorized agreements with certain substantive requirements and effects as to "membership" as that word is qualified by the section's second proviso.

Neither section 8(a)(3) nor any other provision of the NLRA defines "membership." However, this Court has authoritatively interpreted section 8(a)(3) not to require "membership" in the colloquial sense of personal involvement of an employee within a union. Under "the second proviso to § 8(a)(3), the burdens of membership upon which employment may be conditioned are expressly limited to the payment of initiation fees and monthly dues." *NLRB v. General Motors Corp.*, 373 U.S. 734, 742 (1963). Even this "authorizes the exaction of only those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" *Communications Workers v. Beck*, 487 U.S. 735, 762-63 (1988) (quoting *Ellis v. Railway Clerks*, 466 U.S. 435, 448 (1984)).

"A rule of law that is the product of judicial interpretation of a vague, ambiguous, or incomplete statutory provision is no less binding

than a rule that is based on the plain meaning of a statute." *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 112 (1989). After "a statute has been construed . . . by this Court . . . it acquires a meaning that should be as clear as if the judicial gloss had been drafted by the Congress itself." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 268 (1987) (Stevens, J., concurring in part, dissenting in part).

Thus, if Congress can be said to have authorized any "standard-form 'membership' union security agreement," (SAG's Br. at 17), it must be one that requires no more than that nonunion employees pay "those fees and dues necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues,'" *Beck*, 487 U.S. at 762-63 (quoting *Ellis*, 466 U.S. at 448). Logically, the proper form and language of such an agreement should conform with this judicially construed substantive limitation and contain this or equivalent language, not the bare, misleading language of the statute.

SAG attempts to support its schizophrenic construction of section 8(a)(3) by arguing that the first proviso to the section "is addressed to the negotiation of union security agreements," and the second "is addressed [only] to the enforcement of such agreements once negotiated." (SAG's Br. at 9-10; *see id.* at 18-19.) No such artificial dichotomy exists between the two provisos.

As SAG's Brief at 12 concedes, these are "two intertwined provisos." Consequently, ***both*** provisos must be consulted to determine what compulsory unionism agreements may lawfully be negotiated. A "statute is to be read as a whole." The "meaning of statutory language, plain or not, depends on context." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991). The Court looks "not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990).

That is what this Court did in *Beck*. The question there was not merely what limits the second proviso places on the enforcement of compulsory unionism agreements. It was what "limits § 8(a)(3) places on the ***negotiation*** and enforcement of union security agreements." 487 U.S. at 745 (emphasis added). The Court noted that this section

"contains ***two*** provisos without which all union-security ***clauses*** would fall within [§ 8(a)(3)'s] otherwise broad condemnation" of employer discrimination encouraging union membership. The second proviso "***limit[s] the first***." *Id.* at 744 (emphasis added). "***Taken as a whole***, §8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, but ***the 'membership' that may be so required has been 'whittled down to its financial core***.'" *Id.* at 745 (quoting *General Motors*, 373 U.S. at 742) (emphasis added) (footnote omitted). The Court then defined that "financial core" as including "only those fees necessary to finance collective-bargaining activities," because of the Act's policy of "provid[ing] only the most grudging authorization of [union-security] agreements." *Id.* at 755, 759.

B. This Court Has Already Rejected SAG's Misreading of the Legislative History of NLRA Section 8(a)(3).

Section 8(a)(3) was added to the NLRA by the Taft-Hartley Act of 1947, Pub. L. 80-101, 61 Stat. 136, 140. SAG argues that the legislative history of the section shows that Congress gave "express, unequivocal permission . . . for employers and unions to 'enter into agreements requiring all the employees in a given bargaining unit to become members.'" (SAG's Br. at 18-23 (quoting S. Rep. No. 80-105, at 7 (1947) ("S. Rep."), *reprinted in* Subcomm. on Labor, Sen. Comm. on Labor and Public Welfare, *Legislative History of the Labor Management Relations Act, 1947*, at 413 (1974) ("Legis. Hist.")).) However, that legislative history "is a virtual potpourri of conflicting statements and inferences," selected quotation of which can support conflicting interpretations of § 8(a)(3). Thomas R. Haggard, *Compulsory Unionism, the NLRB, and the Courts* 60 (U. Pa. Wharton Sch. Indus. Res. Unit, Lab. Rel. & Pub. Pol'y Series Rep. No. 15, 1977).

For example, SAG quotes the Senate Report's statement "that § 8(a)(3) 'abolishes the closed shop but permits voluntary agreements for requiring such forms of compulsory membership as the union shop.'" (SAG's Br. at 19 (quoting S. Rep. at 3, Legis. Hist. 409).) This proves nothing, because, as Senator Taft, an author of the 1947 legislation, pointed out: "The union shop is not defined. No one knows what it is. We did not use the term in the bill." 93 Cong. Rec. 5081 (1947), Legis. Hist. 1408. Moreover, Congress' intent was not "completely to abolish the union shop," but to permit it only in a

limited form. *Id.* at 5087-88, Legis. Hist. 1420 (remarks of Sen. Taft). Section 8(a)(3)'s ***second*** proviso is a condition that Congress "imposed even on the union shop." *Id.* at 3952-53, Legis. Hist. 1010 (remarks of Sen. Taft).[1]

What SAG ignores is that this Court has already reviewed section 8(a)(3)'s legislative history at least three times. Each time the Court concluded that Congress did not intend to allow agreements that require membership as a condition of employment.

First, in *General Motors*, this Court concluded from the legislative history that "the 1947 amendments not only abolished the closed shop but also made significant alterations in the meaning of 'membership' ***for the purposes of union-security contracts***. . . . 'Membership' as a condition of employment is whittled down to its financial core." 373 U.S. at 742 (emphasis added). As the Ninth Circuit said in *NLRB v. Hershey Foods Corp.*, the "legislative history of the 1947 amendments . . . shows that the union shops permitted by the compromise were burdened by many restrictions and can be described better as '***in the nature of*** union shops.'" 513 F.2d 1083, 1085 (9th Cir. 1975) (quoting H.R. Rep. No. 80-245, at 30 (1947), Legis. Hist. 321) (emphasis added).

After reviewing the legislative history again in *Pattern Makers v. NLRB*, this Court held that "Congress in 1947 sought to eliminate ***completely*** any requirement that the employee maintain full union membership." 473 U.S. 95, 107 (1985) (emphasis added). All requirements to maintain full membership are not eliminated completely if a contract says that "membership" is required.

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[1] For another example, SAG's Brief at 20-21 quotes part of the Senate Report that describes the precursor to § 8(a)(3)'s second proviso as designed "to safeguard the rights of employees after [a union-shop] contract has been entered into," S. Rep. at 7, Legis. Hist. 413. From this single sentence—indeed, from the single word "after"—SAG extrapolates that Congress did not intend § 8(a)(3)'s second proviso to apply to the terms of the contract. That is an incredible—and false—leap of logic (and inconsistent with the legislative history as interpreted by this Court, as we show next). A limit on what a "union security" agreement can say does protect employees ***after*** it is negotiated, because such a limit prevents them from being misled by the agreement.

Lastly, in *Beck*, this Court rejected an argument "that the inroads Congress made in 1947 on the policy of compulsory unionism were . . . limited, and were designed to remedy only those 'carefully defined' abuses of the union shop system that Congress had expressly identified." 487 U.S. at 754. Rather, the legislative history shows that the amendments "provide only the most grudging authorization of [union-security] agreements," giving unions ***only*** "'the power to ***contract*** to meet'" the problem of "'employees who are getting the benefits of union representation without paying for them.'" *Id.* at 755-56 (quoting *Oil Workers v. Mobil Oil Corp.*, 426 U.S. 407, 416 (1976), and *Radio Officers v. NLRB*, 347 U.S. 17, 41(1954)) (emphasis added). Thus, all that a union can contract for under *Beck* is payment of "'collective-bargaining-related dues,'" 487 U.S. at 760.

C. This Court Has Not Affirmed the Validity of "Union Security" Clauses That Purport to Require Membership.

Relying heavily on cases preceding *Beck*, SAG argues that this Court "has gone out of its way to affirm the validity" of "standard-form 'membership' union security clauses." (*E.g.*, SAG's Br. at 11, 24-27.) However, the facial validity of a contract requiring "membership" was not at issue in any of the pre-*Beck* cases. *Beck* itself pointed out that "***we have never before*** delineated the precise limits § 8(a)(3) places on the negotiation . . . of union-security agreements." 487 U.S. at 745 (emphasis added). Therefore, the comments SAG quotes—often out of context—from the earlier cases are at best dicta.

SAG also asserts that *Beck* addresses "only 'whether [§ 8(a)(3)] . . . permits a union, over the objections of dues-paying nonmember employees, to expend [agency fees] on activities unrelated to collective bargaining, contract administration, or grievance adjustment.'" (SAG's Br. at 25-26 (quoting *Beck*, 487 U.S. at 738) (SAG's emphasis omitted).) However, this assertion depends upon selective quotation out of context from *Beck*.

Two of the *Beck* quotations SAG uses, from 487 U.S. at 738 and 749, merely paraphrase section 8(a)(3)'s terms. They are not holdings concerning the validity of a contract that uses those terms literally. Moreover, the first quotation does not say that the section authorizes agreements requiring "membership." It refers only to "an agreement

requiring all employees in the bargaining unit to pay periodic union dues and initiation fees." *Id.* at 738.

A third quotation SAG takes from *Beck* is incomplete. The full sentence implies a limit on both the negotiation and enforcement of "union security" agreements: "***Taken as a whole***, § 8(a)(3) permits an employer and a union to enter into an agreement requiring all employees to become union members as a condition of continued employment, ***but the 'membership' that may be so required has been 'whittled down to its financial core***.'" *Beck*, 487 U.S. at 745 (quoting *General Motors*, 373 U.S. at 742) (footnote omitted) (emphasis added to the language SAG omitted).[2]

Moreover, SAG ignores *Beck*'s repeated characterization of the question presented there as a "question concerning the ***validity of . . . agreements***" "requiring payment of full union dues." *Id.* at 741-42. The nonmembers' claim in *Beck* was "that the union failed to represent their interests fairly and without hostility by ***negotiating*** and enforcing an agreement that allows the exaction of funds for purposes that do not serve their interests and in some cases are contrary to their personal beliefs." *Id.* at 743 (emphasis added). *Beck* "delineated the precise limits § 8(a)(3) places on the ***negotiation*** and enforcement of union-security agreements." *Id.* at 745 (emphasis added).

In sum, *Buzenius v. NLRB*, 124 F.3d 788, 792-93 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3427 (U.S. Dec. 8, 1997) (No. 97-945), and *Bloom v. NLRB*, 30 F.3d 1001, 1003-05 (8th Cir. 1994), correctly concluded that, because of this Court's decisions construing

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[2] *Machinists v. Street*, 367 U.S. 740 (1961), was "controlling" in *Beck* as to "whether th[e] 'financial core' includes the obligation to support union activities beyond those germane to collective bargaining, contract administration, and grievance adjustment." 487 U.S. at 745. However, that does not mean that *Street*'s dicta that "the union-shop agreement itself is not unlawful," 367 U.S. at 771, controls on the question presented here, as SAG's Br. at 26 suggests. There was no allegation in *Street* that the contract there was facially invalid.

section 8(a)(3), agreements that do not state employees' options under those decisions are facially invalid.[3]

II. SAG's Negotiation and Maintenance of a Compulsory Unionism Provision That Overstates Employees' Obligations Breaches the Duty of Fair Representation.

SAG contends that its "union security" agreement does not violate the duty of fair representation, because the phrase "member of the Union in good standing" is a "term of art" that can only be enforced consistent with this Court's construction of section 8(a)(3). SAG says that in *NLRB v. News Syndicate Co.* this Court "squarely held that a union security agreement that is capable of . . . a lawful construction is to be so read and 'cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.'" (SAG's Br. at 23-24 (quoting 365 U.S. 695, 700 (1961).)

Again, SAG quotes the Court out of context. What *News Syndicate* says is that, "***'[i]n the absence of provisions calling***

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[3] SAG argues that *Buzenius* and *Bloom* are distinguishable, because in those cases the compulsory unionism provisions were unlawfully applied. (SAG's Br. at 29 n.8, 37 n.9.) That would be immaterial even if true, because both decisions held the clauses at issue ***facially*** invalid and ordered them expunged or modified. *See Buzenius*, 124 F.3d at 793; *Bloom*, 30 F.3d at 1004-05. Those remedies would have been unnecessary to correct mere unlawful enforcement of facially valid provisions. Moreover, it is undisputed that SAG unlawfully applied this agreement to require payment of full dues, without notice to Petitioner Naomi Marquez ("Marquez") of her *Beck* rights. (Pet. App. at 17a-18a; J.A. at 46.)

Buzenius did not "turn[] on a distinction between 'membership in good standing' union security agreements and 'membership' union security agreements," (SAG's Br. at 37 n.9). *Buzenius* concluded that a "union-security clause" which "say[s] what it cannot literally mean" "misleads employees into believing that they may not exercise free choice in the matter of union membership" and "turns normal contract interpretation on its head." 124 F.3d at 792-93. That is true whether the clause speaks of "membership" or "membership in good standing," "in light of the Court's decisions whittling § 8(a)(3) ***'membership'*** down to its financial core," *id.* at 792 (emphasis added). The phrase "in good standing" simply makes the agreements in *Buzenius* and here even more misleading than agreements that speak only of "membership."

explicitly for illegal conduct, the contract cannot be held illegal because it failed affirmatively to disclaim all illegal objectives.'" 365 U.S. at 699-70 (quoting *NLRB v. News Syndicate Co.*, 279 F.2d 323, 330 (2d Cir. 1960), *aff'd*, 365 U.S. 695 (1961)) (emphasis added). The contract in *News Syndicate* did not explicitly call for illegal conduct, because it did "not require journeymen and apprentices to be union members." *Id.* at 699.

Here, in contrast, the contract does call explicitly for illegal conduct, because it requires all employees to "be a member of the Union in good standing" and pay the "dues and the initiation fee uniformly required as a condition of . . . membership." (J.A. at 28-29.) As SAG concedes, it is only when employees consult "external sources"—"'the body of law which [has] grow[n] up in [the § 8(a)(3) area'"—that they might discover that this contract may require less than it says. (SAG's Br. at 23, 30 (quoting *Teamsters Local 147 v. Lucas Flour Co.*, 369 U.S. 95, 104 n.11 (1962).)

SAG asserts that the "entire panoply of NLRA § 8(a)(3) union security agreement rules" is "incorporated by reference through a standard-form 'membership' union security clause." (SAG's Br. at 4, 14.) However, SAG's "union security" clause contains no reference to external sources explicating those rules. It does not even suggest that external sources need or could be consulted to understand what the clause actually means, that "membership" is not used in the colloquial sense, or that "periodic dues and the initiation fee" mean something quite different from regular union dues and fees. In addition, the clause exacerbates matters by telling the employee that he or she must become a "member of the Union ***in good standing***." (J.A. at 28-29 (emphasis added).)

Quoting its Director of Legal Affairs, SAG claims that "'it is well-known in the industry that a performer does not have to be a member of SAG to work on a project governed by a SAG contract.'" (SAG's Br. at 16 (quoting J.A. at 49).) This self-serving "testimony" is contradicted by the National Labor Relations Board ("NLRB" or "Board") and respected labor-law scholars. (*See* Pet'r's Br. at 14 n.7.)

The "legally prescribed meaning" of "member" might arguably be in "common usage" among experienced labor lawyers and union and employer representatives who negotiate compulsory unionism

clauses. (SAG's Br. at 24.) However, that meaning is unlikely to be in "common usage" among performers, who are not parties to the contract, or casting and talent agents, who enforce the contract at the point of hire. The latter are all laymen who can be expected to understand "member" only in the colloquial sense. Moreover, the issue here is not how the contract might be read by the parties to it. The question is whether one of those parties—the union—has a duty to write a clause that truthfully states, in lay terms, what obligations the clause imposes on third parties—employees—for whom it is a fiduciary and who cannot be charged with knowledge of the intent or understanding of the contracting parties, because they did not participate in the contractual negotiations.

SAG concedes that employees cannot be presumed to know about, let alone fully to understand, the case law applying the "terms of art" used in "union security" agreements, when it states that "[u]nions—in taking any initiative to sign up members, in responding to any employee initiative or inquiry, and in taking any action to enforce a union security clause—must accurately explain to the employee the meaning of the 'membership' requirement." (SAG's Br. at 35.) SAG's defense, thus, is that, although it has a duty "accurately [to] explain to the employee the meaning of the 'membership' requirement," this duty does not arise in negotiating the "union security" clause. That is, SAG asserts that its duty of fair representation does not require it to write a clause that says, in lay terms, what employees' obligations really are.

The short answer to this is that *Beck* explicitly held that a union's duty of fair representation with respect to a "union security" arrangement embraces ***both*** negotiation and enforcement. 487 U.S. at 743. In practice, that duty can be meaningful to employees only if it requires the union "accurately [to] explain to the employee the meaning of the 'membership' requirement" ***in the "union security" agreement itself***, the fundamental "law of the shop."

SAG complains that its negotiation of the clause involved here could not have been arbitrary or in bad faith, because it "follows the 'model union-security clause' prescribed by the NLRB" in *Keystone Coat, Apron & Towel Supply Co.*, 121 N.L.R.B. 880, 885 (1958). According to SAG, *Electronic Workers Local 444*, 311 N.L.R.B. 1031 (1993), *rev'd in part on cross-petitions for review & enforcement*, 41

F.3d 1532 (D.C. Cir. 1994), did not overrule *Keystone Coat* in this regard. SAG relies on the fact that *Electronic Workers Local 444* held that a "'members of the Union in good standing'" clause was not "facially unlawful," because it was "capable of a lawful construction," 311 N.L.R.B. at 1037. (SAG's Br. at 28-29 & n.8.)

However, in *Electronic Workers Local 444* the NLRB also found that the clause was "ambiguous," and that "it is likely that employees unversed in the intricacies of Section 8(a)(3) and interpretative decisions will literally interpret the clause as requiring full membership and all attendant financial obligations." 311 N.L.R.B. at 1037. The Board, therefore, held that the unions there "breached their fiduciary duty to . . . employees by failing to inform them that their sole obligation under the union-security provision was to pay dues and fees." *Id.* at 1040.

Significantly, in a part of its decision entitled "*Keystone* Overruled as to the Model Clause," the Board said: "Because we have found that the phrase 'membership in good standing' is ambiguous, we specifically reject the model clause in *Keystone* which contains this provision." *Id.* at 1041. The Board decided *Electronic Workers* more than a year before SAG entered into its collective bargaining agreement with Lakeside. (*See* Pet'r's Br. at 21 n.10.)

Moreover, the NLRB decided *Keystone Coat* before this Court delineated the limits of section 8(a)(3) in *General Motors* and *Beck*. SAG concedes that, consequently, its clause "reveals the covered employees' rights and duties" only "in terms of art that can only be fully understood by the employees through reference to external sources." (SAG's Br. at 30.) Negotiation of such a clause is *per se* bad faith conduct, despite *Keystone Coat*, because, after *General Motors* and *Beck*, "the only realistic explanation for the retention of the statutory language in collective bargaining agreements . . . is to mislead employees about their right not to join the union." *Wegscheid v. Auto Workers Local 2911*, 117 F.3d 986, 990 (7th Cir. 1997).[4]

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[4] *See also* William B. Gould IV, The Board, The Supreme Court and the National Labor Relations Act: Reflections of the Chairman of the National Labor Relations Board on Issues Decided and Issues Presented, Address at the Connecticut

(continued...)

SAG argues that using the statutory language avoids "contentious" negotiations between employers and unions over "the proper wording of a union security agreement." (SAG's Br. at 32.) If use of the statutory language avoids "contentious" negotiations, even more so will use of the statutory language as definitively construed by this Court. And if "what constitutes an adequate summary of the rights and obligations of employees covered by union security clauses is a highly contested matter" now, (SAG's Br. at 33), it will no longer be so when this Court has spoken clearly on the issue.

In *Keystone Coat*, the Board thought that it "should not be difficult for the parties who draft union-security clauses to adhere to the statutory requirements clearly set forth by Congress" in section 8(a)(3). It also suggested a "model union-security clause" "to assist any parties who might encounter difficulty in drafting." 121 N.L.R.B. at 885. The Board failed to anticipate that *General Motors* and *Beck* would find limits on compulsory unionism clauses that are only implicit in section 8(a)(3), thus rendering drafting a little more difficult and the *Keystone Coat* clause misleading. However, once this Court clearly defines here an adequate statement of the rights and obligations of employees, parties negotiating compulsory unionism clauses should have no difficulty in adhering to the statutory requirements of section 8(a)(3) as definitively construed by this Court.[5]

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[4] (...continued)

Bar Association's Labor and Employment Law Section Seminar on "Ethical Landmines in Labor Relations" at 7 (May 21, 1998), *in* NLRB Release R-2293 ("a majority of the Board subscribes to the view that the duty of fair representation standard has been violated where the collective agreement's language is contrary to the Court's ruling in *General Motors* and *Beck*").

[5] A clause explaining employees' rights and obligations in terms easily understood by laymen is not difficult to draft:

"A. No employee shall be required to become a member of the union as a condition of employment. Each employee shall have the right to join, not join or maintain or drop his membership in the union. No employee shall be discriminated against on account of his membership or non-membership in the Union." *Monsanto Chem. Co.*, 147 N.L.R.B. 49, 50 n.2 (1964).

(continued...)

SAG pretends that the Act "prevents" the misuse of "standard-form 'membership' union-security clauses" to "suggest to employees that they must be full union members," because unions failing to inform employees accurately of their rights "commit an unfair labor practice." (SAG's Br. at 35.) If the Act truly prevented such misuse, cases in which unions have misused "membership" clauses would not have been necessary. *See, e.g.*, *Buzenius v. NLRB*, 124 F.3d 788, 789 (6th Cir. 1997), *petition for cert. filed*, 66 U.S.L.W. 3427 (U.S. Dec. 8, 1997) (No. 97-945); *Bloom v. NLRB*, 30 F.3d 1001, 1002 (8th Cir. 1994); *Rochester Mfg. Co.*, 323 N.L.R.B. No. 36 (Mar. 12, 1997), *petition for review filed sub nom. Cecil v. NLRB*, No. 97-5302 (6th Cir. Mar. 14, 1997). "Membership" clauses clearly facilitate union officials' ability to misrepresent employees' rights.[6] Moreover, how many cases never reach the NLRB or court, because employees never learn that they have been misled by "membership" clauses that overstate their true obligations?

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[5] (...continued)

B. Employees who do not become members of the union after thirty days of employment, and who do not have bona fide religious objections to joining or financially supporting labor organizations, shall as a condition of continuing employment pay to the union an amount equal to "the periodic dues and the initiation fees uniformly required of members," or, if they notify the union that they object to paying for other costs, an amount equal to that portion of the dues and fees "necessary to 'performing the duties of an exclusive representative of the employees in dealing with the employer on labor-management issues.'" 29 U.S.C. §§ 158(a)(3), 169 (1994); *Beck*, 487 U.S. at 762-63 (quoting *Ellis*, 466 U.S. at 448).

[6] SAG misrepresents the record when it asserts that it has not "applied the 'membership' provision to require that performers become 'full' members" and implies that it notifies all performers of their *Beck* rights. (*See* SAG's Br. at 1-2, 16-17.) The Ninth Circuit held that whether SAG affirmatively attempted to require Ms. Marquez to become a full member was a genuinely disputed issue of fact. (Pet. App. at 14a, 16a.) It is undisputed that SAG only gives *Beck* notices to employees who object to membership, and never gave Ms. Marquez such notice. (*Id.* at 17a-18a; J.A. at 46, 51-52.) The Ninth Circuit instructed the district court to decide on remand whether this lack of notice "constituted an arbitrary breach of the duty of fair representation." (Pet. App. at 18a.)

SAG argues that Ms. Marquez's "claim based on the wording of the SAG 'membership' union security clause," like the claim in *Wegscheid*, "is most certainly moot," because she "never saw the clause and was never apprised of its wording," and cannot "claim that the wording of the clause confused her or misled her in any way or that a 'change in the collective bargaining agreement' would be of any significance to her." (SAG's Br. at 40 (quoting *Wegscheid*, 117 F.3d at 990).) This argument is disingenuous, because Lakeside's casting director knew and relied on the clause's text in enforcing it against Marquez. (J.A. at 25-28.) Indeed, when Marquez's talent agent suggested that external law overrode the clause's wording, the casting director replied that she was "obligated to work with that contract," which "by its terms had limitations and restrictions on Lakeside's employing people that were not SAG members." (*Id.* at 34-35.)

Thus, Ms. Marquez was misled indirectly by—and discharged because of—the wording of SAG's "union security" clause even though she did not see it. Unlike the *Wegscheid* plaintiffs, Marquez was injured by the clause, because she lost her job due to SAG's and Lakeside's insistence, at least, on the literal terms of the clause that she pay full dues, if not that she join SAG. (*See* Pet. App. at 2a-4a, 14a, 24a-26a.) It is undisputed that those parties never told Marquez that she could pay less than full dues. (*Id.* at 17a-18a; J.A. at 46.)

Moreover, Ms. Marquez continues to seek employment in the motion picture industry. (Dist. Ct. R. ("R.") 39, Marquez Dep. at 11.) Therefore, modification of the agreement would be significant for her, because the misleading membership and full dues language is part of a "standard-form union security clause" that SAG uses with many employers in that transient industry. (SAG's Br. at 1; *see* J.A. at 28-29, 38-42, 53-54.)

SAG also implies that its "membership" clause did not damage Ms. Marquez, because her talent agents "understood each and every one of the public law limitations on . . . a 'membership' union security clause." (SAG's Br. at 34-35.)[7] As the court of appeals said in

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[7] Another possible inference from the testimony SAG's Brief at 2-3 cites is that Ms. Marquez's agents understood that paying dues ***made*** one a member. (*See* (continued...)

rejecting the identical argument regarding Marquez's claim that SAG misrepresented her obligations in statements outside the bargaining agreement, "[e]ven were this so, . . . [i]f SAG ***asserted*** that Marquez was required to join the union as a condition of employment this would, of course, implicate its duty of fair representation." (Pet. App. at 14a (emphasis added).) What is relevant is not what Marquez or her agents understood the law to be, but what SAG, through Lakeside, was demanding under the contract, which indisputably was at least payment of full dues. *See also NLRB v. Teamsters Local 291*, 633 F.2d 1295, 1298 (9th Cir. 1980) (a "union's fiduciary duty to represent and deal fairly with" employees required it to inform an employee of his obligations under a "union security" agreement though he independently "had full knowledge of his responsibility to pay").

In sum, none of SAG's excuses justifies its negotiation and maintenance of a compulsory unionism provision that misleadingly states obligations that cannot lawfully be enforced against employees, *i.e.*, full membership and payment of full dues and initiation fees.

III. SAG Does Not Explain Why the Duty of Fair Representation Is Breached, and the Federal Courts Have Jurisdiction, If a Union Misrepresents the *Extent* of an Employee's Obligations Under Section 8(a)(3), But Not If It Misrepresents *When* Those Obligations Apply.

The second question this case presents is whether the NLRB has exclusive jurisdiction over a claim that SAG breached the duty of fair representation by negotiating a compulsory unionism clause that misinforms performers who have been employed in the motion picture industry for more than thirty days that they must be union members before they begin any new employment. (Pet'r's Br. at i, ¶ II.) SAG argues that this claim is within the NLRB's exclusive jurisdiction because it "'rests squarely upon the proper interpretation of § 8(a)(3).'" (SAG's Br. at 45 (quoting Pet. App. at 13a).)

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[7] (...continued)

J.A. at 33 (a "financial core ***member*** is required to pay only for the collective bargaining agreement"), 37 ("My understanding was that 'must join' meant paying the required financial obligation. ***Beyond that I'm not aware of specifically what happens with paperwork or contracts***").)

However, SAG does not argue that the NLRB has exclusive jurisdiction over a claim that a union breached the duty of fair representation by negotiating a compulsory unionism clause that misinforms employees that they must be members and pay full dues. *Beck* forecloses such an argument. *Beck* held that the latter claim is not within the NLRB's exclusive jurisdiction, even though that claim also rests squarely on the proper interpretation of section 8(a)(3), *i.e.*, whether the clause states employees' obligations in terms section 8(a)(3) prohibits. *See* 487 U.S. at 742-44.

Indeed, SAG ***concedes*** that an "allegation that a union has misled employees about their obligations under a union security agreement is, substantively, a 'claim that the union failed to represent [the employees'] interests fairly and without hostility,' and is, in that sense, the kind of fair representation claim presented in *Beck*." SAG also ***concedes***: "that the Union here, like the union in *Beck*, 'seek[s] to defend [it]sel[f] on the ground that the statute authorizes precisely this type of agreement' does not divest the federal courts of jurisdiction." (SAG's Br. at 43 (quoting *Beck*, 487 U.S. at 743).) These concessions are fatal to SAG's argument on this jurisdictional issue.

In *Wegscheid*, the Seventh Circuit explicitly ruled, based on *Beck*, that "an alleged violation of section 8(a)(3) is litigable in a district court suit challenging statements" that "happen to be contained in the collective bargaining agreement, since the union's duty of fair representation can be violated by union conduct in the negotiation of a collective bargaining agreement, as well as in the enforcement of it." 117 F.3d at 989 (citations omitted). SAG does not explain how the question of the facial validity of a compulsory unionism clause that misleadingly speaks of a membership or full dues requirement that violates section 8(a)(3) is different from the question of the facial validity of a clause that misleadingly speaks of a thirty-day "employment in the industry" requirement that also violates that section. No logical distinction exists. In both cases, deciding the appropriate scope of section 8(a)(3) is necessary, as it was in *Beck*.

Ignoring *Wegscheid*, SAG cites *Beverly Enterprises-Pennsylvania v. District 1199C*, 90 F.3d 93 (3d Cir. 1996). (SAG's Br. at 44.) *Beverly Enterprises* is inapposite, because there an employer, to whom the union owed no duty of fair representation, attempted to attack the

validity of its own compulsory unionism provision solely and directly on the ground that the provision violated section 8(a)(3).

SAG also relies on *Motor Coach Employees v. Lockridge*, 403 U.S. 274 (1971). (SAG's Br. at 44-45.) However, *Lockridge* ***supports***, not undermines, court jurisdiction over Ms. Marquez's claim concerning SAG's "employment in the industry" clause. *Lockridge* recognized that "an action seeking damages for injury inflicted by a breach of a union's duty of fair representation [i]s judicially cognizable . . . even if the conduct complained of [i]s arguably protected or prohibited by the National Labor Relations Act." Moreover, *Lockridge* acknowledged that perhaps "Lockridge's second amended complaint could be construed to assert . . . th[is] theor[y] of recovery." 403 U.S. at 299. Lockridge's claim was preempted only because "'arbitrary or bad-faith conduct on the part of the Union'" was "not even asserted to be relevant in the proceedings below." *Id.* at 299-300 (quoting *Vaca v. Sipes*, 386 U.S. 171, 193 (1967)). Here, in contrast, Marquez *did* assert below that SAG's negotiation of the "employment in the industry" clause was arbitrary and in bad faith. (*E.g.*, Appellant's Br. at 3, 44-47 (9th Cir. filed Sept. 3, 1996); J.A. at 9-10, ¶¶ 10-11; *id.* at 24, ¶ 11.)

SAG attempts to escape the force of its concessions by contending that Ms. Marquez cannot "recast her claim to be that 'SAG's negotiation of [a] misleading 'employment in the industry' requirement breached the duty of fair representation,'" because "the word 'misleading' does not appear once in the section of Ms. Marquez's Ninth Circuit brief addressed to the grace period issue." (SAG's Br. at 49 (quoting Pet'r's Br. at 22).) Even were that true, this Court can consider an issue not raised below in a federal-court case where "the issue is squarely presented and fully briefed" and "is an important, recurring issue." *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980); *see Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 697-98 (1984).

Here, the claim that negotiation and maintenance of the "employment in the industry" clause breached the duty of fair representation, because it is "misleading," was squarely presented by the second Question Presented in the Petition for a Writ of Certiorari at i; SAG's Response to the Petition did not argue that Ms. failed to raise this claim below. In addition, both parties have fully briefed the claim. (Pet'r's Br. at 22-28; SAG's Br. at 40-50.)

More important, Ms. Marquez has not "recast" this claim. SAG ***falsely*** suggests that she did not argue below that the "employment in the industry" clause on its face breached the duty of fair representation because it was misleading. Marquez explicitly raised this claim below.

Ms. Marquez's Complaint alleged that "maintenance" of the "employment in the industry" clause "violated the duty of fair representation which requires that . . . it ***accurately*** advise employees of their rights and obligations." (J.A. at 9-10, ¶¶ 10-11 (emphasis added).) Her Motion for Summary Judgment asserted that the clause breaches the duty because "on its face [it] unlawfully ***purports*** to require" payment before thirty days of employment by Lakeside. (J.A. at 24, ¶ 11 (emphasis added).) Her Ninth Circuit Brief explicitly made the same argument she makes here, albeit in a section discussing the appropriate remedy for SAG's unfair representation "in negotiating an agreement including" "the 'membership in good standing,' full dues and fees, ***and 'employment in the industry'*** clauses":

> Expunction is necessary, because a facially invalid clause "has the clear capacity to ***mislead*** employees." While the "Union Security" provision here contains limits implied as a matter of law . . . , it nonetheless is ***misleading***. Those limitations are not apparent on the provision's face, and employees are unlikely to know about the judicial gloss placed on such agreements.

(Appellant's Br. at 53-54 (quoting *Schreier v. Beverly Cal. Corp.*, 892 F. Supp. 225, 227 (D. Minn. 1995)) (emphasis added) (citations omitted).)[8]

The second question presented here also includes whether, if the Board's jurisdiction is not exclusive, the breach occurred. (Pet'r's Br.

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[8] Marquez also submitted *Wegscheid* to the court of appeals as a supplemental authority, arguing that jurisdiction over her attack on the "employment in the industry" clause was supported by *Wegscheid*'s holding that a "federal district court has 'jurisdiction to entertain a challenge to a union's misrepresentations in a collective bargaining agreement' concerning an employee's obligations under a compulsory unionism provision as a breach of the duty of fair representation." (Citation of Supp. Auths. at 1 (filed June 30, 1997) (quoting 117 F.3d at 989).)

at i, ¶ II.) The facial invalidity under section 8(a)(3) of SAG's "employment in the industry" clause is clear under all relevant precedents, including one directly on point, *Theatrical Stage Employees Local 644*, 259 N.L.R.B. 1415, 1416, 1422 (1982); (*see* Pet'r's Br. at 22-24, 27). SAG, however, contends that its negotiation of the clause could not have breached the duty of fair representation, because the NLRB "indicated that employees are not entitled to a new 'thirty day grace period with every employment relationship' where a multi-employer bargaining unit is involved," in *Mayfair Coat & Suit Co.*, 140 N.L.R.B. 1333 (1963), and *Asbestos Workers Local 5*, 191 N.L.R.B. 220 (1971). (SAG's Br. at 46 (quoting Pet'r's Br. at 22).) Even were that true, it is irrelevant, because SAG's clause does not impose a single grace period upon employment with a multi-employer bargaining unit, but upon employment with ***any employer "in the motion picture industry."*** (J.A. at 29 (emphasis added).)

Moreover, SAG cites no case ***holding*** that one thirty-day grace period can lawfully apply to different employers in a multi-employer bargaining unit.[9] No question was raised as to the validity of the "grace period" provisions in either *Mayfair Coat & Suit* or *Asbestos Workers Local 5*. Furthermore, in both cases the employee was ***delinquent*** under the compulsory unionism provision in his prior employment in the multi-employer unit. *See Asbestos Workers Local 5*, 191 N.L.R.B. at 220; *Mayfair Coat & Suit*, 140 N.L.R.B. at 1334-35. When an employer rehires an employee it had previously employed, or hires an employee whom another employer in the same multi-employer unit previously employed, that employee is entitled to a new grace period unless he or she was in arrears in dues payments during the earlier employment. *E.g., Carpenters Local 740*, 238 N.L.R.B. 159, 160-61 (1978); *Teamsters Local 174*, 149 N.L.R.B. 1570, 1571-73 (1964). The latter rule would control here, because Ms. Marquez was ***not*** delinquent in her prior employment in the motion picture industry. (*See* Pet. App. at 15a; R. 39, Marquez Dep. at 9-11.)

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[9] The Administrative Law Judge's comment SAG's Brief at 46 quotes from *Theatrical Stage Employees Local 644* is, at most, uncertain dicta: "the existence of a multiemployer bargaining unit . . . ***might***, even in the absence of continuous employment, provide some ***theoretical*** basis for legality to Respondent's union-security provisions." 259 N.L.R.B. at 1422 (emphasis added).

SAG also cites no evidence that Lakeside and Marquez's prior employer in the industry were in the same multi-employer bargaining unit. Lakeside was not in ***any*** multi-employer unit. Lakeside merely separately signed the collective bargaining agreement in question two years after it was negotiated. (J.A. at 42; R. 39, Lakeside's Resp. to Pls.' 1st Interrogs. at 5-6, ¶¶ 3-4; *see* SAG's Br. at 1.) The very case SAG selectively quotes for the "basic test . . . to determine whether Lakeside ha[d] joined the multi-employer unit which originally negotiated" the agreement, (SAG's Br. at 47), establishes conclusively that Lakeside did not become a part of that unit: "'As a general rule, . . . an employer does not become part of a multi-employer bargaining group . . . where it merely adopts a collective-bargaining agreement in the negotiation of which it did not actually participate and which it did not authorize another to negotiate on its behalf.'" *NLRB v. New York Typographical Union*, 632 F.2d 171, 183 (2d Cir. 1980) (quoting *Ruan Transp. Corp.*, 234 N.L.R.B. 241, 242 (1978)).[10]

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[10] SAG's Brief at 47 also misrepresents *Carpenters Local 740*. The NLRB there found "without merit" a contention, based on *Interstate Electric Co.*, 227 N.L.R.B. 1996 (1977), that one grace period should apply to all contractors signatory to identical bargaining agreements with a union. Because there was "no multiemployer agreement" in *Carpenters Local 740*, the Board found "it unnecessary . . . to further consider the applicability, if any, the rationale expressed in *Interstate* [concerning 29 U.S.C. § 158(f)(4) (1994)] may have to cases involving Sec. 8(f)(2) of the Act," 29 U.S.C. § 158(f)(2) (1994). 238 N.L.R.B. at 161 n.5.

Interstate Electric, discussed in SAG's Br. at 47 n.11, is wholly inapposite, because it was based on "the special allowances which Section 8(f) makes for the employers and labor organizations in the building and construction industry." 227 N.L.R.B. at 1998. Congress has made no special allowances for the motion picture industry. Neither the courts nor the Board can do so. (*See* Pet'r's Br. at 27.) Moreover, *Interstate Electric* is wrong even as to a multi-employer bargaining unit in the construction industry, because it "is clear from the plain meaning of the statute that the antecedent basis of 'such employer' in section 8(f)(4) is '***an*** employer.'" *Robertson v. NLRB*, 597 F.2d 1331, 1335-36 & n.12 (10th Cir. 1979) (emphasis added). Similarly, it is clear that the antecedent basis of "such employment" in section 8(a)(3)'s first proviso is "***an*** employer." 29 U.S.C. § 158(a)(3), 1st proviso (emphasis added).

That "the Board can change its mind about the appropriate application of the Act in a given context," (SAG's Br. at 48 n.12), does not justify SAG's negotiation of its "employment in the industry" clause. The NLRB can "change its mind" about the application of the Act ***only*** if its reconsideration "is rational and consistent with the Act," *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 787 (1990). Reconsideration on this issue would be both irrational and inconsistent with the Act, because in *Theatrical Stage Employees Local 644* the Board held that a clause like SAG's "***clearly*** contravenes the statutory intent of Section 8(a)(3)." 259 N.L.R.B. at 1416, 1422 (emphasis added). As *Robertson v. NLRB* suggests, the Board cannot, consistently with the Act, rewrite it such that "the precise language used by Congress would be changed so that 'an employer' would read 'employers.'" 597 F.2d 1331, 1335 (10th Cir. 1979).

SAG's final defense of its "employment in the industry" clause is that there "is nothing 'misleading' about" that clause, because it clearly states what the parties meant by it. (SAG's Br. at 49-50.) That contention is obviously fallacious. Saying that it is not misleading for an agreement to state that employees have an obligation to pay dues, when legally they have none, is Orwellian.

CONCLUSION

The judgments below should be reversed on all Questions Presented and remanded as requested in Petitioner's Brief at 30-31.[11]

Respectfully submitted,

RAYMOND J. LAJEUNESSE, JR.
Petitioner's Counsel of Record

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[11] Contrary to SAG's Brief at 15, Ms. Marquez does contend that the "remand should include instructions that the district court order SAG and Lakeside to ***modify*** their current 'union security' provision so that it no longer overstates the obligations imposed, ***or*** to expunge that provision completely" if they choose not to so modify it. (Pet'r's Br. at 30-31.)

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No. 97-1056

IN THE
Supreme Court of the United States

OCTOBER TERM, 1998

NAOMI MARQUEZ,

Petitioner,

v.

SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITIONER'S SUPPLEMENTAL BRIEF

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August 19, 1998

20 pp

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PETITIONER'S SUPPLEMENTAL BRIEF

On August 7, 1998, after Petitioner Naomi Marquez filed her Reply Brief, the United States Court of Appeals for the Eighth Circuit decided *Bloom v. NLRB*, No. 97-1582, 1998 WL 455632 ("*Bloom II*"). Pursuant to Supreme Court Rule 25.5, Ms. Marquez files this Supplemental Brief to present this new authority that directly supports her position on the first question presented here. We reproduce the *Bloom II* decision in the Appendix to this Supplemental Brief ("Supp. App.").

ARGUMENT

The first question this case presents is:

> Does a union breach its duty of fair representation when it negotiates and maintains a compulsory unionism provision that, on its face, requires—misleadingly—that an employee be "a member of the Union" and pay the periodic dues and initiation fee "uniformly required as a condition of acquiring membership," even though those requirements cannot lawfully be enforced as a condition of employment?

(Pet'r's Br. at i.)

Bloom II was the second petition for review of a decision and order of the National Labor Relations Board ("Board" or "NLRB"). On the first petition, the Eighth Circuit held that a unilateral settlement agreement approved by the Board was inadequate, because it did not delete a facially unlawful compulsory unionism provision that misleadingly required that all employees become union members "in good standing" as a condition of employment. *Bloom v. NLRB*, 30 F.3d 1001, 1003-05 (8th Cir. 1994) ("*Bloom I*"); *see Bloom II*, 1998 WL 455632, at *1-*2 (Supp. App. at 2a-4a). The court also held in *Bloom I* that the NLRB's "remedial notice itself was misleading" and "contrary to law," "because it purported to enforce a provision requiring membership but providing 'that employees need only pay the Union's periodic dues and initiation fees.'" *Bloom II*, 1998 WL 455632, at *2 (Supp. App. at 4a) (quoting *Bloom I*, 30 F.3d at 1004); *see Bloom I*, 30 F.3d at 1004-05.

On remand, the Board approved a revised settlement agreement between the union and the Board's General Counsel, over the charging party's objections. The settlement agreement removed the phrase "in good standing" from the compulsory unionism provision. However, it substituted the following language:

> "All employees . . . shall, as a condition of continued employment, become and remain members in the Union, . . . within the requirements of the National Labor Relations Act. Union membership is required only to the extent that Employees must pay either (i) the Union's initiation fees and periodic dues or (ii) service fees which in the case of a regular service fee payer shall be equal to the Union's initiation fees and periodic dues and in the case of an objecting service fee payer shall be the proportion of the initiation fees and dues corresponding to the proportion of the Union's total expenditures that support representational activities."

Bloom II, 1998 WL 455632, at *3 (Supp. App. at 5a-6a).

This clause is more informative than the compulsory unionism provision in this case. (*See* J.A. at 28-29.) Nonetheless, on the charging party's second petition for review, the Eighth Circuit held that this "language is not simply misleading and coercive, it is repugnant to the Supreme Court's pronouncements in" *Communications Workers v. Beck*, 487 U.S. 735 (1988), and *Pattern Makers v. NLRB*, 473 U.S. 95 (1985). *Bloom II*, 1998 WL 455632, at *6 (Supp. App. at 11a).

The Eighth Circuit based its decision on the principle, equally applicable here, that one of the National Labor Relations "Act's primary policies, and a fundamental tenet underlying all of labor relations jurisprudence, is voluntary unionism, the notion that a person's job, or the terms of his employment, may never be conditioned upon membership in a labor union." *Id.* at *5 (Supp. App. at 9a). The court of appeals explained its holding with reasoning that applies even more strongly here:

> Although *no* employee can be required to join the union, this provision turns truth upon its head and informs those it governs that *all* employees are required to become and remain union members. The confusing caveat that follows the offending clause contains nothing from which an employee might possibly glean the knowledge that he may decline to join the union. In any event, ***no subsequent qualifying language, how-***

> ***ever cleverly crafted, should be deemed sufficient to negative the unqualified command expressed in the first sentence of the challenged provision***. . . . The employee, unschooled in semantic legal fictions, cannot possibly discern his rights from a document that has been designed by the union to conceal them.

Id. at *6 (Supp. App. at 11a-12a) (emphasis added).

The Eighth Circuit also explicitly rejected an argument that Respondent Screen Actors Guild ("SAG") has made here, (*see* SAG's Br. at 22-24): in this "context, ***'member' is not a term of 'art,' as has been suggested to us, but one of deception."*** *Bloom II*, 1998 WL 455632, at *6 (Supp. App. at 12a) (emphasis added). Negotiation and maintenance of a collective bargaining agreement provision containing such deceptive language, obviously, breach the exclusive bargaining representative's "statutory obligation to serve [the] interests of all employees 'without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct.'" *Id.* at *5 (Supp. App. at 9a-10a) (quoting *Vaca v. Sipes*, 386 U.S. 171, 177 (1967)).

Because the settlement agreement approved by the NLRB in *Bloom II* was not only contrary to law, but also apparently "calculated to evade both the letter and spirit of *Bloom I*," the Eighth Circuit did not just deny enforcement of the Board's order. The court also remanded the case with specific instructions. *Id.* at *7 (Supp. App. at 12a). It instructed that the compulsory unionism provision approved by the Board be completely expunged and a provision the court drafted be substituted. That provision is clear and strikingly similar to the "model clause" proposed in Petitioner's Reply Brief at 11 n.5:

> No employee shall be required to become or remain a member of the union as a condition of employment.
>
> Each employee shall have the right to freely join or decline to join the union.

> Each union member shall have the right to freely retain or discontinue his or her membership.
>
> Employees who decline to join the union may be required, at a minimum, to pay a reduced service fee equivalent to his or her proportionate share of union expenditures that are necessary to support solely representational activities in dealing with the employer on labor-management issues.
>
> No employee shall be discriminated against on account of his or her membership or non-membership in the union.

Bloom II, 1998 WL 455632, at *7 (Supp. App. at 12a-13a).[1]

CONCLUSION

The unanimous opinion of the Eighth Circuit in *Bloom II* provides a powerful argument for reversing the judgment below on the first question presented here.

Respectfully submitted,

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August 19, 1998

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[1] The court also declared that it "will no longer uphold or enforce a union security clause that does not contain this language or reflect its undiluted equivalent." 1998 WL 455632, at *7 (Supp. App. at 13a).

APPENDIX

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT IN *BLOOM V. NLRB*

August 7, 1998

[1998 WL 455632]

GARY A. BLOOM,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, OFFICE AND PROFESSIONAL EMPLOYEES INTERNATIONAL UNION, AFL-CIO LOCAL 12, INTERVENOR ON APPEAL,

Respondents.

No. 97-1582.

United States Court of Appeals,
Eighth Circuit.

Submitted March 11, 1998.

Decided Aug. 7, 1998.

Petition for Review of an Order of the National Labor Relations Board.

Before WOLLMAN, BEAM, and HANSEN, Circuit Judges.

WOLLMAN, Circuit Judge.

[*1] Gary A. Bloom, on behalf of himself and those similarly situated, petitions for review of a decision and order of the National Labor Relations Board issued pursuant to our remand in *Bloom v. N.L.R.B.*, 30 F.3d 1001, 1005 (8th Cir. 1994) (*Bloom I*). The Office and Professional Employees International Union, Local 12, has intervened on behalf of the Board. We deny enforcement of the decision and order, and we remand with directions.

I.

During the summer of 1991, Bloom was hired as a clerical worker with Group Health, Inc. His position placed him within a bargaining unit represented by the union. The collective bargaining agreement between Group Health and the union contained the following union security clause:

> ARTICLE 1
> UNION RECOGNITION AND UNION SHOP
>
> ....
>
> 1.03 All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in good standing in the Union, and all such Employees subsequently hired shall make application and become members of the Union within thirty-one (31) days.

A few months after Bloom was hired, Group Health began to withhold union dues and initiation fees from his paycheck without his authorization and remit them to the union. In October, the union sent Bloom the following letter:

> Our office has been informed that you are now working for Group Health, Inc. We have never received an Application for Membership or a Voluntary Dues Checkoff Card from you. I am enclosing them and would like you to fill them out, sign them and return them to our office as soon as possible so that we can place you in the Union. We need these for our records and also to send to our International Office.

Bloom sent a reply to the union stating that he had received the application form but had not yet decided if he wanted to join. He also stated that he had not authorized any deduction from his paycheck. He requested an itemization of how union dues were spent and reimbursement for the dues that had already been withheld. The union responded as follows:

> As stated in the New Member Packet, it is a part of the Collective Bargaining Agreement between Office and Professional Employees International Union, Local 12, and Group Health, Inc. that you must become a member of the Union thirty- one days after you are hired. **If you choose not to be a member of Local 12, I shall have no alternative but to request GHI that your employment be terminated**. It is my sincere hope that you will choose to join Local 12 and return the cards to this office as we have requested.

(Emphasis supplied). In the meantime, Group Health continued to withhold union dues and fees from Bloom's paychecks and deposit them in union coffers.

In December of 1991, Bloom filed charges with the Board on behalf of himself and "similarly situated discriminatees" against Group Health and the union, alleging unfair labor practices under the National Labor Relations Act (Act), 29 U.S.C. § 158 (1973 & Supp. 1998). Bloom challenged the facial validity of the union security clause. He alleged that Group Health and the union had enforced the illegal membership obligations required by that clause upon himself and others by deducting union dues without authorization, refusing to inform employees of their right to decline union membership and pay only a reduced fee associated with representational costs, and threatening those who decline union membership with termination.

[*2]In January of 1993, the parties' stipulation of facts and motion to transfer the proceedings to the Board were approved. While the case was pending, Group Health and the union entered into a unilateral settlement agreement with the Board's General Counsel. Over Bloom's objections, the Board approved the settlement by unpublished order on September 29, 1993. The agreement purported to remedy the unfair labor practices detailed by Bloom by requiring the union to post notices "in conspicuous places in and about the employer's plant where they shall be maintained for 60 consecutive days from the date of posting." The notice essentially stated that Group Health would no longer

deduct and the union would no longer accept union dues without authorization. It further stated that neither party would interfere with Group Health employees' rights under the Act and that the provision of the collective bargaining agreement requiring union membership would no longer be enforced "unless such provision also provides that employees need only pay the Union's periodic dues and initiation fees." The public notice also took care to single out Bloom as the employee who had filed charges with the Board. Bloom's complaint was then summarily dismissed.

Bloom petitioned for review pursuant to section 10(f) of the Act, 29 U.S.C. 160(f). We reversed the Board's approval of the settlement. *See Bloom I*, 30 F.3d at 1005. In particular, we concluded "that the settlement agreements are inadequate, for they do not delete the misleading union security clause that the charged parties unlawfully interpreted and applied." *Id.* at 1004. We also expressly rejected the idea that the presence of the unlawful clause in the bargaining agreement could be remedied by posting notice that the clause would not be enforced. *See id.* at 1005 ("posting a temporary notice stating that the collective bargaining agreement will not be enforced as it is drafted is not sufficient to protect Group Health's employees' section 7 right to refrain from union activities"). Indeed, we concluded that the remedial notice itself was misleading, because it purported to enforce a provision requiring membership but providing "that employees need only pay the Union's periodic dues and initiation fees." *Id.* at 1004. Such language is itself contrary to law, we noted, because employees can never be required to become union members or "pay *all* union dues and initiation fees," but rather "need only pay that portion of union dues and fees attributable to the union's representational activities." *Id.* at 1004-05 (emphasis in original). Thus, "[b]ecause the overly broad union security clause was unlawfully interpreted and applied," we ordered that it be expunged from the collective bargaining agreement. *Id.* at 1005. We remanded the case to the Board for further proceedings.

[*3]On remand, Group Health and the union entered into a second settlement agreement with the General Counsel. The revised settlement provided that Group Health and the union would amend their contract to delete the provision requiring that employees become members in good standing and substitute a provision providing that union membership is required, but only to the extent that employees must pay the union's periodic dues and initiation fees. Bloom objected to the revised settlement, contending that it did not comport with our instructions in *Bloom I*. Nonetheless, the Board approved it and again dismissed Bloom's complaint. *See Group Health, Inc.*, 323 N.L.R.B. No. 31 (Feb. 27, 1997) (*Group Health II*). Bloom petitioned for review, seeking enforcement of our original mandate.

After the record and the parties' initial briefs were filed, the Board filed a motion requesting that we remand the matter so that the Board might reconsider its order in light of the Sixth Circuit's decision in *Buzenius v. N.L.R.B.*, 124 F.3d 788 (6th Cir. 1997). We granted the motion and remanded the case, expressly retaining jurisdiction over Bloom's petition. The Board then granted a motion by the union and Group Health to amend the settlement agreement a third time. The third settlement deleted the "in good standing" phrase from the collective bargaining agreement and substituted the following union security clause:

> All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in the Union, and all such Employees subsequently hired shall become members of the Union within thirty-one (31) calender days, within the requirements of the National Labor Relations Act. Union membership is required only to the extent that Employees must pay either (i) the Union's initiation fees and periodic dues or (ii) service fees which in the case of a regular service fee payer shall be equal to the Union's initiation fees and periodic dues and in the case of an objecting service fee payer shall be the proportion of the initiation fees and dues

corresponding to the proportion of the Union's total expenditures that support representational activities.

Over Bloom's objections, the Board approved the settlement and issued its Supplemental Decision and Order on Remand. *See Group Health, Inc.*, 325 N.L.R.B. No. 49 (Feb. 2, 1998) (*Group Health III*).

II.

We deal first with jurisdictional matters. Pursuant to our grant of its motion to file supplemental briefs on the eve of oral argument, the Board has raised an eleventh-hour challenge to our authority over this case. It asserts that Bloom is not a "person aggrieved" under section 10(f) of the Act, 29 U.S.C. § 160(f), and thus does not have standing to petition for review of its order. We do not agree. Whenever the Board enters a final order against a charged party to its review proceeding, that party is a "person aggrieved" under the Act and is entitled to seek direct review in the appropriate court of appeals. *See International Union, United Auto., Aerospace & Agric. Implement Workers of America, AFL-CIO, Local 283 v. Scofield*, 382 U.S. 205, 210, 86 S. Ct. 373, 15 L.Ed.2d 272 (1965). Similarly, "if the Board determines that a complaint should be dismissed, the charging party has a statutory right to review as a 'person aggrieved.' "*Id.*[1] Bloom is a charging party whose complaint was dismissed by the Board. As a result, he has express authorization from Congress to seek our review of the Board's order.

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[1] *See also Oil, Chemical & Atomic Workers Local Union No. 6-418, AFL-CIO v. N.L.R.B.*, 694 F.2d 1289, 1294-95 (D.C. Cir. 1982); *N.L.R.B. v. Oil, Chemical & Atomic Workers Int'l Union, AFL-CIO*, 476 F.2d 1031, 1036 (1st Cir. 1973); Annotation, *Who is a "Person Aggrieved," Entitled, Under Section 10(f) of the Amended National Labor Relations Act, To Review of Final Order of National Labor Relations Board in Appropriate Court of Appeals*, 1 A.L.R. Fed. 550 (1969 & 1997 Supp.).

[*4]Although Bloom is clearly entitled to petition for review, he must also establish standing under Article III. *See Wilcox Elec., Inc. v. Federal Aviation Admin.*, 119 F.3d 724, 727-28 (8th Cir. 1997); *City of St. Louis v. Department of Transp.*, 936 F.2d 1528, 1532 (8th Cir. 1991). We conclude that he has done so. Bloom suffered the requisite "injury in fact" when union dues and fees were withheld from his paycheck without authorization. He has never entered into nor approved any settlement of his claims resulting from that incident. His injuries will not have been fully redressed until he has recovered not only the confiscated funds, but an appropriate award of interest to compensate for the period during which they were unlawfully utilized. *See United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 690 n.14, 93 S. Ct. 2405, 37 L.Ed.2d 254 (1973) (approving of concept that "an identifiable trifle is enough for standing to fight out a question of principle").[2]

Nonetheless, the Board asserts that Bloom lacks standing because, seven years after his initial complaint, he is no longer employed by Group Health, an argument more closely related to the question of mootness. From the beginning, Bloom has

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[2] An injury sufficient to confer standing upon a party need not be monetary in nature. For instance, Bloom's constitutional rights to free speech and association may have been implicated, and he may have been constructively discharged as the result of his reluctance to join the union. *Cf. Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507, 516-19, 111 S. Ct. 1950, 114 L.Ed.2d 572 (1991) (discussing First Amendment implications of compulsory union dues); *Clayton v. White Hall Sch. Dist.*, 778 F.2d 457, 459 (8th Cir. 1985) (discussing possibility of standing based upon "work environment" or "associational" injury). The necessary injury in fact might also be premised upon the union's violation of the Act itself. *See Federal Election Comm'n v. Akins*, --- U.S. ----, ---- - ----, 118 S. Ct. 1777, 1785-86, 141 L.Ed.2d 10 (1998) (identifying injury sufficient to confer standing resulting from violation of "statute which ... does seek to protect individuals such as respondents from the kind of harm they say they have suffered").

consistently maintained this action on behalf of himself and those "similarly situated" who also have suffered as a result of the union's illegal practices against those who prefer not to join. This is, in other words, a representative petition. Although it is true that one generally may not support jurisdiction by seeking to vindicate the legal rights of others, that is a judicially self-imposed limitation upon federal jurisdiction which has no roots in Article III. *See United Food & Commercial Workers Int'l Union, Local 751 v. Brown Group, Inc.*, 50 F.3d 1426, 1429 n. 3 (8th Cir. 1995) (quoting *Allen v. Wright*, 468 U.S. 737, 751, 104 S. Ct. 3315, 82 L.Ed.2d 556 (1984)), *rev'd on other grounds*, 517 U.S. 544, 116 S. Ct. 1529, 134 L.Ed.2d 758 (1996). Consequently, "[a] federal statute may give a putative plaintiff the right to bring suit, thus relieving him of the judicially-created, prudential standing requirements." *Brown Group*, 50 F.3d at 1429; *see also Akins*, --- U.S. at ---- - ----, 118 S. Ct. at 1783-84; *Family & Children's Ctr., Inc. v. School City of Mishawaka*, 13 F.3d 1052, 1059-60 (7th Cir. 1994). As the Supreme Court has recently observed, "[h]istory associates the word 'aggrieved' with a congressional intent to cast the standing net broadly—beyond the common-law interests and substantive statutory rights upon which 'prudential' standing traditionally rested." *Akins*, --- U.S. at ----, 118 S. Ct. at 1783. We conclude that Congress intended to cast the standing net broadly here by authorizing "[a]ny person aggrieved" to seek review of an order by the Board under section 10(f) of the Act.

[*5]Because Congress's express grant of standing to aggrieved persons such as Bloom extends to the limits of that which is permitted by Article III, the typical gauntlet of prudential limitations stands as no obstacle to our duty to promote the efficient interests of justice and, in particular, to enforce our previous mandate regarding the union security clause. *See Family & Children's Ctr.*, 13 F.3d at 1061; *Akins*, --- U.S. at ---- - ----, 118 S. Ct. at 1783-84; *Brown Group*, 50 F.3d at 1429. Thus, because Bloom seeks to vindicate the rights of all those currently affected by the facially invalid clause in the collective bargaining agreement, because he is the original charging party

and a "person aggrieved" authorized by Congress to petition for review, and because he himself satisfies the minimum requirements for Article III standing, we conclude that his cause is not moot. "To hold otherwise would frustrate the remedial purposes of the Act." *N.L.R.B. v. Laborers Int'l Union of North America, AFL-CIO, Local 282*, 567 F.2d 833, 836 (8th Cir. 1977); *see also N.L.R.B. v. Modine Mfg. Co.*, 500 F.2d 914, 916 n.4 (8th Cir. 1974) (proceedings are not moot when settlement between employer and union contains cease and desist order and parties are "entitled to have the resumption of the unfair [labor] practice barred by an enforcement decree"); *N.L.R.B. v. Douglas & Lomason Co.*, 443 F.2d 291, 294 (8th Cir.1971).

III.

In *Bloom I*, we made clear that, although "[t]he Board has a longstanding policy of encouraging the settlement of labor disputes," it must "not approve a settlement that does not effectuate the purposes and policies of the Act." 30 F.3d at 1003. One of the Act's primary policies, and a fundamental tenet underlying all of labor relations jurisprudence, is voluntary unionism, the notion that a person's job, or the terms of his employment, may never be conditioned upon membership in a labor union. *See id.* Enlisting in a union is a wholly voluntary commitment; it is an option that may be freely undertaken or freely rejected. Thus, section 7 of the Act guarantees employees the right to engage, or refrain from engaging, in activities in support of collective bargaining. 29 U.S.C. § 157. Section 8(a)(3) makes it an unfair labor practice to discriminate "in regard to hire or tenure of employment or any term or condition of employment" for the purpose of encouraging or discouraging membership in a labor union. 29 U.S.C. § 158(a)(3). Likewise, the Act imposes a duty of fair representation upon labor organizations, prohibiting them and their agents from restraining or coercing employees in the exercise of guaranteed rights. 29 U.S.C. § 158(b); *see also Vaca v. Sipes*, 386 U.S. 171, 177, 87 S. Ct. 903, 17 L.Ed.2d 842 (1967) (stating that union's status as exclusive bargaining representative gives rise to statutory

obligation to serve interests of all employees "without hostility or discrimination toward any, to exercise its discretion with complete good faith and honesty, and to avoid arbitrary conduct").

[*6]Section 8(a)(3) of the Act provides:

> *Provided*, That nothing in this subchapter ... shall preclude an employer from making an agreement with a labor organization ... to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later.

29 U.S.C. § 158(a)(3). Read literally, this language would permit unions and employers to include within a collective bargaining agreement a provision that would require union membership as a condition of employment. As we pointed out in *Bloom I*, however, the Supreme Court has not given section 8(a)(3) a literal reading. 30 F.3d at 1003-04.

In *Pattern Makers' League of North America, AFL-CIO v. N.L.R.B.*, 473 U.S. 95, 107 n.16, 105 S. Ct. 3064, 87 L.Ed.2d 68 (1985), the Court noted that the payment of dues is the only aspect of union membership that can be required under section 8(a)(3); *see also N.L.R.B. v. General Motors Corp.*, 373 U.S. 734, 742, 83 S. Ct. 1453, 10 L.Ed.2d 670 (1963). In *Communications Workers of America v. Beck*, 487 U.S. 735, 762-63, 108 S. Ct. 2641, 101 L.Ed.2d 634 (1988), the Court held that nonunion employees can be required to pay only those dues and fees associated with costs incurred by the union in association with its core representational activities. *See also International Ass'n of Machinists & Aerospace Workers v. N.L.R.B.*, 133 F.3d 1012, 1015 (7th Cir. 1998); *Vic Koenig Chevrolet, Inc. v. N.L.R.B.*, 126 F.3d 947, 951 (7th Cir. 1997). A union may insist upon nothing more from an employee and may not require membership in any sense. "This has been settled law for some time, and the only realistic explanation for the retention of the statutory language in

collective bargaining agreements, as the courts have observed, is to mislead employees about their right not to join the union." *Wegscheid v. Local Union 2911*, 117 F.3d 986, 990 (7th Cir. 1997).

As set forth above, the clause under challenge here begins with the following statement:

> All Employees of the Employer subject to the terms of this Agreement shall, as a condition of continued employment, become and remain members in the Union, and all such Employees subsequently hired shall become members of the Union within thirty-one (31) calender days, within the requirements of the National Labor Relations Act.

This language is not simply misleading and coercive, it is repugnant to the Supreme Court's pronouncements in *Beck* and *Pattern Makers* and is in direct conflict with our mandate in *Bloom I*. Although *no* employee can be required to join the union, this provision turns truth upon its head and informs those it governs that *all* employees are required to become and remain union members. The confusing caveat that follows the offending clause contains nothing from which an employee might possibly glean the knowledge that he may decline to join the union. In any event, no subsequent qualifying language, however cleverly crafted, should be deemed sufficient to negative the unqualified command expressed in the first sentence of the challenged provision.[3] As Bloom can well attest, when an employee who is

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[3] *See Buzenius*, 124 F.3d at 792 ("To permit the [collective bargaining agreement] to say what it cannot literally mean does violence both to the Act's policy of voluntary unionism and to principles of contract interpretation"); *Wegscheid*, 117 F.3d at 990-91; *Bloom I*, 30 F.3d at 1004-05; *but see Marquez v. Screen Actors Guild, Inc.*, 124 F.3d 1034, 1037-39 (9th Cir. 1997), *cert. granted*, — U.S. —, 118 S. Ct. 1298, 140 L.Ed.2d 465 (March 23, 1998); *International Union of Electronic, Elec.,Salaried, Mach. & Furniture Workers, AFL-CIO v. N.L.R.B.*, 41 F.3d 1532, 1537-38 (D.C.Cir. 1994).

approached regarding union membership expresses reluctance, a union frequently will produce or invoke the collective bargaining agreement in an attempt to pressure him into signing up. The employee, unschooled in semantic legal fictions, cannot possibly discern his rights from a document that has been designed by the union to conceal them. In such a context, "member" is not a term of "art," as has been suggested to us, but one of deception. In his concurrence to the Board's opinion, Chairman Gould conceded as much. *See Group Health III*, 325 N.L.R.B. No. 49 at 5 (Gould, concurring).

[*7]The settlement agreement approved by the Board on remand seems to have been calculated to evade both the letter and spirit of *Bloom I*. The Board's supplemental decision reflects a disregard of our directives. Accordingly, rather then simply remanding this case to the Board for further proceedings consistent with our opinion, we remand with specific instructions. *See Iowa Utilities Bd. v. Federal Communications Comm'n*, 135 F.3d 535, 541 (8th Cir. 1998) ("We have not only the power, but also a duty to enforce our prior mandate to present evasion").

INSTRUCTIONS AND ORDER

The offending union security clause contained within the third settlement agreement shall be deleted in its entirety. In its stead, the following provision shall be inserted:

> No employee shall be required to become or remain a member of the union as a condition of employment.
>
> Each employee shall have the right to freely join or decline to join the union.
>
> Each union member shall have the right to freely retain or discontinue his or her membership.

> Employees who decline to join the union may be required, at a minimum, to pay a reduced service fee equivalent to his or her proportionate share of union expenditures that are necessary to support solely representational activities in dealing with the employer on labor-management issues.
>
> No employee shall be discriminated against on account of his or her membership or non-membership in the union.

Moreover, we hereby serve notice that we will no longer uphold or enforce a union security clause that does not contain this language or reflect its undiluted equivalent.

The union and Group Health may agree to include, in a section that follows the foregoing language, a clause that further explains the various levels of membership and non-membership from which an employee is free to select. However, the agreement may contain no language that states or implies that an employee must join or become a member of the union (or remain a union member) in any sense or context. Before approving the agreement as so revised, the Board shall ensure that Bloom has been fully redressed for any fees or dues unlawfully withheld from his paycheck, including an appropriate award of interest thereon.

We deny enforcement of the Board's decision and order, and we remand the case to the Board for the inclusion of the above set forth language in the union security clause and for the entry of appropriate relief to Bloom.

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No. 97-1056

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

NAOMI MARQUEZ,
Petitioner,
v.

SCREEN ACTORS GUILD, INC., and
LAKESIDE PRODUCTIONS, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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RESPONDENT'S REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

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RESPONDENT'S REPLY TO PETITIONER'S SUPPLEMENTAL BRIEF

This brief for Respondent Screen Actors Guild is filed in reply to Petitioner Naomi Marquez's Supplemental Brief (Supp. Br.) addressed to the recent decision in *Bloom v. NLRB*, No. 97-1582 (8th Cir. Aug. 7, 1998) (Supp. App.).

ARGUMENT

1. We agree with Ms. Marquez that the "opinion of the Eighth Circuit in *Bloom II* provides a powerful argument" as to what the first proviso to § 8(a)(3) of the National Labor Relations Act, as amended, 29 U.S.C. § 158(a)(3), means and how that provision should be implemented. Supp. Br. at 5. But, that "powerful argument" is *against* Ms. Marquez's appeal for a deep and standardless judicial incursion into the free collective bargaining process. And that argument is *for* the Ninth Circuit's eminently sound approach in this case of taking plain statutory language for what it says:

> [N]othing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization . . . to require as a condition of employment membership therein . . . [29 U.S.C. § 158(a)(3).]

The *Bloom* litigation as a whole—and the Eighth Circuit's latest decision in particular—confirms Justice Stewart's observation that "[i]t does not behoove a court to second-guess either th[e collective bargaining] process or its products," *California Brewers Ass'n v. Bryant*, 444 U.S. 598, 608 (1980), and Congress' decision to draft NLRA § 8(a)(3) and its provisos so as to preclude such second-guessing.

2. As we developed in our main brief (at pp. 17-23), after "devot[ing] the most mature deliberation . . . [to] the problem posed by compulsory union membership," the 1947 Congress chose to continue the statutory permission for employers and unions to "enter into agreements requiring all the employees in a given bargaining unit to be-

come members." S. Rep. No. 105, 80th Cong., 1st Sess. 7 & 5 (1947), reprinted in 1 NLRB, *Legislative History of the Labor Management Reporting Act of 1947* 411 & 413 (1948) ("LMRA Leg. Hist."). Congress' reason for so doing was that "the union shop has been in force in many industries for many years, and to upset it today probably would destroy relationships of long standing and probably would bring on more strikes than it would cure." 2 LMRA Leg. Hist. at 1010 (Sen. Taft). Thus, in drafting § 8(a)(3) and its provisos, the Taft-Hartley Congress made a considered decision to *refrain* from "abolishing the possibility of a union-shop contract" and to instead permit union security agreements in the form that "in many trades . . . was entirely customary and had worked satisfactorily." 2 LMRA Leg. Hist. at 1420 (Sen. Taft). Conveying this Congressional decision, "the [first] proviso to § 8(a)(3) . . . expressly permit[s] agreements conditioning employment upon membership in a labor union." *Retail Clerks v. Schermerhorn*, 373 U.S. 746, 751 (1963).

Congress stated its intent on the legality of customary union security agreements with clarity. And that being so, for a half-century after the enactment of the 1947 Taft-Hartley amendments, this Court and the NLRB have recognized the validity of union security agreements expressed in one or another of the standard formulations tracking the provisos to NLRA § 8(a)(3), *viz.*, the "union shop" clause which "require[s] as a condition of employment membership [in the union]," or the "agency shop" clause which requires employees to "tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership." *See NLRB v. General Motors Corp.*, 373 U.S. 734, 741-742 (1962) (defining the "union shop" and the "agency shop" and confirming the legality of both).

The Eighth Circuit's decision does not take issue with any of the foregoing, but rather ignores the statutory language and its legislative history, and distorts the decisional law on the validity of standard-form union security agreements.

3. The set of Eighth and Sixth Circuit decisions culminating in the latest *Bloom* decision—and the NLRB decisions those court decisions have generated—demonstrates the deleterious consequences of standardless judicial intervention into the collective bargaining process.

The Eighth Circuit decision in *Bloom v. NLRB*, 30 F.3d 1001 (8th Cir. 1994), began this process. *Bloom* came before the Eighth Circuit on a petition to review an NLRB decision approving the settlement of a unfair labor practice complaint alleging that a collective bargaining agreement contained an "overly broad union security clause" that had been "unlawfully interpreted and applied." *Id.* at 1005.[1] Given these allegations, the Eighth Circuit held that "an adequate remedy *in this case* requires expunction of *the offending clause*." *Id.* (emphasis added). And, because the settlement had not provided for the expunction of the offending clause, the Eighth Circuit reversed the Board's approval of the settlement and remanded for further proceedings.[2]

On remand from the first *Bloom* decision, the NLRB approved a second settlement that, in the Board's view, met "the concerns about the original settlements expressed

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[1] The union respondent in that case was alleged to have "advised Bloom that the collective bargaining agreement required that he be a member of the union and that if he did not *complete the membership* application and the dues checkoff card, Local 12 would request that Group Health terminate him." 30 F.3d at 1002 (emphasis added). Thus, the union was charged with having made "a literal application of the 'member in good standing' language" contained in the collective bargaining agreement. *Id.* at 1005.

[2] After *Bloom* the D.C. Circuit upheld the validity of standard "union shop" clauses in *I.U.E. v. NLRB*, 41 F.3d 1533, 1539 (D.C. Cir. 1994), and the D.C. and Seventh Circuits upheld the validity of standard "agency shop" clauses in *Abrams v. Communications Workers*, 59 F.3d 1375, 1378-79 (D.C. Cir. 1995), and *Nielsen v. Machinists*, 94 F.3d 1107, 1113-14 (7th Cir. 1996). The Seventh Circuit treated *Bloom* as limited to the question of whether "the settlement agreement should have required the expunction of the union security clause in the[] circumstances, because it had been 'unlawfully interpreted and applied.'" 94 F.3d at 1114, quoting 30 F.3d at 1005.

by the Eighth Circuit" in that "the language objected to by the court has been deleted and different language substituted." *Group Health, Inc.*, 323 NLRB No. 31 (1997), slip op. 3.[3] But, the charging party once again petitioned for review in the Eighth Circuit.

The Sixth Circuit then took matters a step further in *Buzenius v. NLRB*, 124 F.3d 788 (6th Cir. 1997), *pet. for cert. pending sub nom., Paperworkers v. Buzenius*, No. 97-945. While recognizing that "the Act explicitly permits an employer to enter into a CBA that contains a union-security clause requiring employees to acquire and retain 'membership' in a union as a condition of employment," *id.* at 790, the Sixth Circuit held that "a union-security clause requiring employees to become and remain 'members of the Union *in good standing*' as a condition of continued employment, *without concurrent definition in the collective bargaining agreement*," *id.* at 788 (emphasis added), is not lawful. At the same time, the Sixth Circuit emphasized that "union security clauses are valid in general." *Id.* at 791.

In reaction to *Buzenius*, the NLRB asked the Eighth Circuit to remand the *Bloom* case, so that the Board could reconsider its approval of the settlement in light of the Sixth Circuit's decision. When the Eighth Circuit granted the NLRB's request, the parties, in an effort to avoid another round of litigation, once again revised their settlement agreement, this time to meet the concerns expressed in the Sixth Circuit's decision. The new Group Health clause was phrased in terms of " 'membership' as a condition of employment," which the Sixth Circuit had repeatedly said was allowed by the statute. *Buzenius*, 124 F.3d at 790, 791 & 793. In addition, the clause contained a "concurrent definition of that term." *Id.* at 791. *See also id.* at 788, 792 & 793.

The new Group Health clause provided its "concurrent definition" of "membership" in two steps. First, the clause specified that it was a "condition of employment" that

[3] Before the NLRB, the case known as *"Bloom"* in the Eighth Circuit was known as *"Group Health."*

employees "become members of the Union . . . *within the requirements of the National Labor Relations Act.*" *Group Health, Inc.*, 325 NLRB No. 49 (1998), slip op. 1-2 (emphasis added). Second, the clause contained the following brief description of what membership "within the requirements of the National Labor Relations Act" entails:

> Union membership is required only to the extent that Employees must pay either (i) the Union's initiation fees and periodic dues or (ii) service fees which in the case of a regular service fee payor shall be equal to the Union's initiation fees and periodic dues and in the case of an objecting service fee payer shall be the proportion of the initiation fees and dues corresponding to the proportion of the Union's total expenditures that support representational activities. [*Id.* at 2.]

By any standard, this new Group Health clause met the *Buzenius* "concurrent definition" requirement. Not surprisingly, then, the NLRB approved the new Group Health clause as meeting the concerns of the Eighth Circuit in *Bloom* and the Sixth Circuit in *Buzenius*. *Group Health Inc.*, 325 NLRB No. 49 (1998). But the plethora of different views expressed by the various NLRB members in the process only added to the confusion. Two Board members (Members Fox and Liebman) found this Group Health clause to contain an accurate and proper "explanation of the lawful extent of the employees' union obligation." 325 NLRB No. 49, slip op. 3 (quotation marks and brackets omitted). A third member (Member Hurtgen) found that the clause warranted approval as part of settlement agreements, but declined to express any view as to whether "the Board as a matter of policy, should require a different clause or, at least, should have a different clause as a model." *Id.* at 2 n. 10. NLRB Chairman Gould agreed that the Group Health clause warranted approval as part of the settlement agreements, but went on to strongly urge that the Board adopt his own preferred "model union-security clause." *Id.* at 6. And, the fifth Board member (Member Brame) dissented from the approval of the settlement agreements "both because

they fail to remedy defects explicitly identified by the court of appeals, and because they would put the Board in the business of issuing advisory opinions in unfair labor practice proceedings without litigation of the issues." *Id.* at 7.

In reversing the NLRB's third and latest *Group Health* decision, the Eighth Circuit's decision in *Bloom II* adds to the cacophony. The decision in *Bloom II* mandates a union security provision that is nothing like what the Group Health parties negotiated and orders that the court's clause be included in the parties' collective bargaining agreement. Supp. App. 12a-13a. And, contrary to the Sixth Circuit's *Buzenius* decision, which recognized that "union security clauses are valid in general," 124 F.3d at 791, the Eighth Circuit declared that it "will no longer uphold or enforce a union security clause that does not contain this language or reflect its undiluted equivalent," Supp. App. 13a. Thus, the Eighth Circuit ruled in effect that *all* extant union security clauses—included in thousands of collective bargaining agreements within that court's jurisdiction—are legal nullities.

We submit that the Eighth Circuit's approach would be wrong even if that court had proved to be a better draftsperson than the labor and management parties to collective bargaining or the different sets of Board members in *Group Health*. This is so because "the fundamental premise on which the [National Labor Relations] Act is based [is] private bargaining under governmental supervision of the procedure alone, *without any official compulsion over the actual terms of the contract.*" *H.K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970)(emphasis added). *See UMWA Health & Retirement Funds v. Robinson*, 455 U.S. 562, 576 (1982). But the *Bloom* court did not simply act beyond its authority, that court drafted and mandated a clause that both fails to express the obvious intent of the contracting parties and fails to fulfill the court's stated goal of providing a clear explanation to employees of their statutory rights.

To begin with, the union security clause prescribed in *Bloom II* is nothing like the union security agreement sanctioned by the NLRA § 8(a)(3) first proviso. The type of agreement contemplated by the statute provides that covered employees are "require[d] as a condition of employment" to either become a full union member and remain current in dues payments or in the alternative to "tender the periodic dues and initiation fees uniformly required as a condition of acquiring or retaining membership." 29 U.S.C. § 158(a)(3). *See NLRB v. General Motors Corp.*, 373 U.S. at 741. By contrast, the *Bloom II* "union security" clause—appearing in the fourth of the five paragraphs prescribed by the Eighth Circuit—provides:

> Employees who decline to join the union *may be required, at a minimum,* to pay a reduced service fee equivalent to his or her proportionate share of union expenditures that are necessary to support solely representational activities in dealing with the employer on labor-management issues. [Supp. App. 13a (emphasis added).]

This does not create a contractually binding union security agreement in any sense. Nothing in the *Bloom* provision says—or even fairly implies—that any covered employee is *required* to pay any amount to the union acting as her collective bargaining representative, much less that the requirement will be enforced as a condition of employment. And, the *Bloom* clause ignores altogether that the covered employees who do become full union members —as well as employees who do not—are properly subject to union security requirements, as well.

The *Bloom II* clause also fails as a notice of the rights of objecting nonmembers. The clause does not even suggest, much less state, that "dissent is not to be presumed —it must affirmatively be made known to the union by the dissenting employee." *Machinists v. Street*, 367 U.S. 740, 774 (1961). And, the Eighth Circuit's standard for the amount that nonmembers "may be required, at a minimum to pay," i.e., "his or her proportionate share of union expenditures that are *necessary* to support *solely* reresenta-

tional activities in dealing with the employer on labor-management issues," Supp. App. 13a (emphasis added), is far more restrictive than this Court's "germane to collective bargaining" standard for chargeable union expenditures. *Ellis v. Railway Clerks*, 466 U.S. 435, 447 (1984). As this Court has explained, under that standard:

> [O]bjecting employees may be compelled to pay their fair share of not only the direct costs of negotiating and of settling grievances and disputes, but also the expenses of activities or undertakings normally or reasonably employed to implement or effectuate the duties of the union as exclusive representative of the employees in the bargaining unit. [*Id.* at 448.]

Beyond that, the *Bloom II* clause creates contract rights for covered employees to "freely join . . . the union" and to "freely retain . . . membership," Supp. App. 12a, that would appear to override any union rules governing admission to or expulsion from membership. This is contrary to Congress' decision to "not impair the right of a labor organization to prescribe its own rules with respect to the acquisition or retention of membership therein." 29 U.S.C. § 158(b)(1). *See also Steele v. Louisville & Nashville R. Co.*, 323 U.S. 192, 204 (1944) ("the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership").

4. As if the foregoing were not enough to condemn the Eighth Circuit's foray into the drafting of collective bargaining agreements, the *Bloom II* court announced that the Eighth Circuit "will no longer uphold or enforce" *any* union security clause but the one that court has mandated. That is the Eighth Circuit rule no matter how clear it may be that the parties intended to reach a union security agreement within the bounds of the law and no matter how clearly they may have explained that intent and the legal ramifications to the covered employees.

This sweeping invalidation of all extant union security agreements—including the agency shop provision specifically approved by this Court in *NLRB v. General Motors Corp., supra,*—will most certainly "infringe" the union's

right to expend uniform exactions under the union-shop agreement in support of activities germane to collective bargaining," *Railway Clerks v. Allen*, 373 U.S. 113, 122 (1963), and will thereby, "interfere with the . . . unions' performance of those functions and duties which the [National Labor Relations] Act places upon them to attain its goal of stability," *Machinists v. Street*, 367 U.S. at 771.

The Eighth Circuit blithely invalidates this central provision in thousands of collective bargaining agreements without pausing a moment to consider the practical consequences. Even if the Eighth Circuit had given clear and legally sound guidance on what sort of agreement should be substituted for standard form union security agreements —and it has not done so—that would not serve to amend all of the existing collective bargaining agreements *pro tanto*. Given the bi-lateral system of free collective bargaining, the affected unions would have to convince the employers to come to terms on a union security agreement for a second time and in a new and unfamiliar form. It is far from clear that the employers would be under any duty to bargain over such midterm modifications of their contracts. *See* NLRA § 8(d), 29 U.S.C. § 158(d). It is, moreover, totally unclear whether the unions would be privileged to strike in support of their demand for a new union security clause or what it would mean for the binding effect of the rest of the agreement were the union to go on strike.

It is precisely to avoid this sort of disruption that Congress wrote NLRA § 8(a)(3) and its provisos as it did. As Congress recognized, a contract's function is to establish a legal relationship between the parties. Such legal documents do *not*, as a rule, serve as a compendium of all the legal consequences flowing from the parties' agreement or as some form of notice informing third parties of all of the contract's ramifications and legal consequences. A contract provision stated in terms of art that are well understood by the parties and are capable of lawful enforcement is well suited to playing its role in the contractual regime. That is why such clauses are lawful under the

general law of contracts and have always been regarded as lawful under the NLRA.

The *Bloom II* court points to no language in the NLRA that would justify the punitive and wholly irrational results visited by its decision. Nor is there any policy basis for invalidating the entire universe of union security clauses.

Prior to the Sixth Circuit's decision in *Buzenius* and the Eighth Circuit's *Bloom* decisions, the NLRB placed the obligation to notify employees of their legal rights and obligations under union security clauses squarely on the employees' union representive. *Paperworkers (Weyerhaeuser Paper Co.)*, 320 NLRB 349, 350 (1995), *rev'd on other grounds. Buzenius v. NLRB, supra.*

In other words, the Board placed the obligation to notify employees of the effect of the agreement on the only party to the contract that has a statutory duty to the employees in this regard. If the union fails to take affirmative steps to inform an employee of the legal limits on the enforcement of the union security clause, the NLRB remedies that dereliction by ordering the *union*, to so inform the employees; by allowing the employees to retroactively exercise their rights to refrain from union membership and refrain from paying full dues; and by redressing any harm that was actually caused by the union's failure. *See Rochester Manufacturing Co. (Teamsters Local 614)*, 323 NLRB No. 36, slip op. 4 (March 12, 1997), *pet. for rev. pending sub nom., Cecil v. NLRB*, No. 7-5302 (6th Cir.) (ordering union to notify employees of their rights and to retroactively honor resignations from membership and nonmember objections by reimbursing the nonchargeable portion of the objectors' agency fees).

The NLRB's approach to the problems of informing employees of the nature of their obligations under a union security clause is not only consistent with the language of the NLRA and the intent of Congress, but also with the rights and needs of employees and the realities of the collective bargaining system.

CONCLUSION

The decision of the court of appeals should be affirmed.

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